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No. 10

Supreme Court, U.S.
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In The Supreme Court of the United States

DEBORAH J. PRUNTY, *et al.*,

Petitioners,

v.

ROY M. TERRY, JR., CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. If a Virginia state court issues a Final Decree of Divorce that establishes Debtor's rights in all property acquired during his marriage, whether the Bankruptcy Court is required to give full faith and credit to the state court's order on that issue? Is relitigation of an issue decided by the state court barred by collateral estoppel and *res judicata*?

II. Whether a Chapter 7 Debtor has any interest in real property that was purchased with assets owned by Debtor's ex-wife before their marriage, if, under Virginia law, all property owned by the ex-wife before her marriage is her separate property to which debtor has no claim?

III. Whether a Chapter 7 trustee may use 11 U.S.C. 544 to nullify the legal effect of "tenants by the entireties" in a deed held by Debtor and his non-debtor spouse?

IV. In a case in which the Debtor signs a written agreement containing a promise to quitclaim certain real property to an ex-wife pursuant to a Marital Agreement, whether the date of transfer, for the purposes of 11 U.S.C. 547(4), is the date the agreement was signed or the date the Debtor actually signed the deed?

V. Whether, under Virginia law, the Debtor's refusal to sign a quitclaim deed pursuant to a Marital Agreement gave his ex-wife a "right to payment," thus turning the ex-wife into a creditor?

VI. Whether the ex-wife is an insider of the Debtor if the Debtor was convicted of domestic violence (Assault & Battery) against the non-debtor ex-wife, who had to get a protective order before the date of divorce?

VII. By recovering her property owned before her marriage, whether Debtor's ex-wife received more than she would have in a Chapter 7 liquidation?

LIST OF PARTIES TO THE PROCEEDING

Petitioner

Deborah J. Prunty, in her individual capacity and as the Trustee of the Deborah J. Prunty Revocable Trust

Respondent

Roy M. Terry, Chapter 7 Trustee

Debtor

Richard D. Paschall, Debtor

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceeding iii

Table of Authorities v

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions

Statement of the Case 2

Reasons for Granting the Petition 6

Conclusion 21

Appendix:

Stipulations of Fact filed December 23, 2008 in the U.S. Bankruptcy Court for the Eastern District of Virginia, Richmond Division, *Terry v. Prunty, et al.*, Adv. Proc. No. 08-03049. ..... App. 1

Excerpt from Transcript of oral argument in Bankruptcy Court on January 8, 2009 ..... App. 22

Memorandum Opinion of the U.S. Bankruptcy Court for the Eastern District of Virginia, Richmond Division, *Terry v. Prunty, et al.*, Adv. Proc. No. 08-03049, February 20, 2009. . App. 26

Order of the U.S. Bankruptcy Court of the U.S. Bankruptcy Court for the Eastern District of Virginia, Richmond Division, *Terry v. Prunty, et al.*, Adv. Proc. No. 08-03049, February 20, 2009. ..... App. 61

Memorandum Opinion of the U.S. District Court for the Eastern District of Virginia, Richmond Division (Affirming Order of the Bankruptcy Court and Remanding for Further Proceedings), *Prunty, et al. v. Terry*, Civil Action No. 3:09CV220-HEH, May 1, 2009. ..... App. 66

Order of the U.S. District Court for the Eastern District of Virginia, Richmond Division (Affirming Order of the Bankruptcy Court and Remanding for Further Proceedings), *Prunty, et al. v. Terry*, Civil Action No. 3:09CV220-HEH, June 1, 2009. .... App. 89

Order of the U.S. Court of Appeals for the Fourth Circuit granting permission to appeal, *Prunty, et al. v. Terry*, No. 09-198 (3:09CV220-HEH), July 14, 2009..... App. 91

Opinion of the U.S. Court of Appeals for the Fourth Circuit, *Prunty, et al. v. Terry*, No. 09-1790, upholding decision of the District Court, Submitted June 26, 2010, Decided July 14, 2010. ..... App. 93

Order of the U.S. Court of Appeals for the Fourth Circuit, *Prunty, et al. v. Terry*, No. 09-1790 (3:09CV220-HEH), affirming judgment of the District Court, July 16, 2010.....App. 96

Stay of Mandate of the U.S. Court of Appeals for the Fourth Circuit, *Prunty, et al. v. Terry*, No. 09-1790 (3:09CV220-HEH), July 26, 2010. .....App. 98

Order of the U.S. Court of Appeals for the Fourth Circuit, *Prunty, et al. v. Terry*, No. 09-1790 (3:09CV220-HEH), denying petition for rehearing, September 21, 2010.....App. 100

Mandate of the U.S. Court of Appeals for the Fourth Circuit, *Prunty, et al. v. Terry*, No. 09-1790 (3:09CV220-HEH), stating that effective date of judgment is September 29, 2010.....App. 102

United States Constitution, Article IV, §1....App. 104

11 U.S.C. § 101.....App. 105

11 U.S.C. § 544.....App. 108

11 U.S.C. § 547.....App. 110

§ 20-107.3 of the Code of Virginia, 1950, as amended. .....App. 111

§ 20-109.1 of the Code of Virginia, 1950, as amended ..... App. 124

§ 20-111 of the Code of Virginia, 1950, as amended. ..... App. 126

§ 20-155 of the Code of Virginia, 1950, as amended. ..... App. 128

Rule 1:1 of the Rules of the Supreme Court of Virginia ..... App. 129

TABLE OF AUTHORITIES

State Cases

Brogan v. Brogan, 31 Va.App. 769, 525 S.E.2d 618 (2000) 10

Papuchis v. Papuchis, 2 Va.App. 130, 132, 341 S.E.2d 829, 831 (1986). 12

Rogers v. Rogers, 512 S.E.2d 821, 257 Va. 323 (Va., 1999). 13

Vasilion v. Vasilion, 192 Va. 735, 66 S.E.2d 599 (Va., 1951).....13

Federal Cases

In Re: Genovese, 96 F.3d 1438 (4th Cir., 1996). 7

In Re: Reasonover, 236 B.R. 219 (Bankr. E.D.Va., 1999).....15

Schlossberg v. Barney, 380 F.3d 174 (4th Cir., 2004). 10

In Re: Skorich, 482 F.3d 21 (1st Cir., 2007).....17

In Re: Shawhan, BAP No. NV-08-1049-JuKuK. (B.A.P. 9th Cir. 7/7/2008). 8

Federal Statutes

11 U.S.C. § 101 (10).....16

11 U.S.C. § 101 (31).....20

11 U.S.C. § 101 (54).....15

11 U.S.C. § 544.....3, 12, 21

11 U.S.C. § 547.....2, 3, 6, 15, 21

State Statutes

§ 20-107.3 of the Code of Virginia, 1950, as amended.....10, 11, 18

§ 20-155 of the Code of Virginia, 1950, as amended.....16

Rule 1:1 of the Rules of the Supreme Court of Virginia. 19

Constitutions

United States Constitution, Article IV; §1.....9

Petitioner Deborah J. Prunty ("Prunty") respectfully requests that this Court issue a writ of certiorari to review the judgment entered in this case by the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Memorandum Opinion of the United States Bankruptcy Court for the Eastern District of Virginia, Richmond Division, is reported at 403 B.R. 366 (Bankr. E.D.Va. 2009) and is contained in the Appendix at A-26.

The Memorandum Opinion of the United States District Court for the Eastern District of Virginia, Richmond Division, upholding the decision of the U.S. Bankruptcy Court, is reported at 408 B.R. 79 (E.D.Va., 2009) and is contained in the Appendix at A-66.

The opinion of the United States Court of Appeals for the Fourth Circuit upholding the decision of the United States District Court is unpublished and is contained in the Appendix at A-93.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. §1254(1) to review the order of the court of appeals on a writ of certiorari. The judgment of the

United States Court of Appeals for the Fourth Circuit, denying Petitioner's appeal of the District Court's ruling, was handed down on September 21, 2010. This petition for writ of certiorari is timely filed within 90 days from that date. Sup. Ct. Rule 13.3. Jurisdiction in the trial court was based on 28 U.S.C. §1334(e)(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS

See Appendix.

STATEMENT OF THE CASE

This case is an attempt by a Chapter 7 Trustee to sell certain real estate owned by Deborah Prunty, the ex-wife of debtor, Richard Paschall, pursuant to 11 U.S.C. 547. The Trustee alleges that the subject property, which was titled in the names of Debtor and Prunty as tenants by the entireties during their short marriage, is part of Debtor's estate.

The Virginia state court resolved the issue of Debtor's interest in the subject property by a Final Decree of Divorce entered on September 13, 2006. The issue of whether Debtor has any interest in the subject property was central to the outcome of the adversary brought by the Chapter 7 Trustee. The

Bankruptcy Court refused to be bound by the Virginia court's determination of Debtor's interest in the subject property. Moreover, assuming that the issue had not been resolved by the state court, the Bankruptcy Court did apply Virginia law to determine the Debtor's interest in the property as required by applicable law. Applying Virginia law to the facts of this case establishes that the subject property was Prunty's separate property in which Debtor had no interest.

Debtor signed two quitclaim deeds in August, 2006, which transferred title to the real property to Prunty. The Trustee is seeking to have the quitclaim deeds vacated, so that the real property owned by Prunty can be sold to satisfy Debtor's debts. Trustee relies on 11 U.S.C. 547 in support of his belief that the transfer of the real estate to Prunty was an impermissible preference.

To be successful, Trustee must prove (1) that a transfer occurred; (2) if so, when the transfer occurred; (3) that Debtor had an interest in the subject property; (4) that Prunty was one of Debtor's creditors; (5) that Prunty is an insider; (6) that the transfer was on account of an antecedent debt; and (7) that Debtor was insolvent. As part of the analysis, the Trustee is deemed to have the rights of a hypothetical lien creditor and/or a *bona fide* purchaser pursuant to 11 U.S.C. 544.

I. FACTS

Richard Paschall, Debtor, and Deborah Prunty were married on June 29, 2002. During the marriage, they purchased two pieces of real property. All of money used to purchase the property came from assets owned by Prunty before her marriage. Both parcels of real estate were titled as tenants by the entirety.

On March 2, 2005, Debtor and Prunty executed a Marital Agreement prepared by Debtor's lawyer. The Marital Agreement required Debtor to transfer title to the real estate to Prunty by quitclaim deeds. On March 31, 2006, they signed a Buyout Agreement that modified certain terms of the Marital Agreement, which was also prepared by Debtor's lawyer.

After the Agreements were signed, Prunty began asking Debtor to sign the quitclaim deeds. Debtor refused. Prunty filed for divorce in January, 2006. The trial was scheduled for April 4, 2006. Debtor appeared, *pro se*, and asked for a continuance so that he could get a lawyer. The trial was rescheduled for July 31, 2006, at which time the judge awarded Prunty the divorce and upheld the validity of the Agreements, which Debtor had challenged.

Debtor finally signed the quitclaim deeds on August 13, 2006.

Meanwhile, after the Agreements were signed but before Debtor signed the quitclaim deeds, Debtor assaulted Prunty in their home. She called the police, who arrested Debtor and charged him with Assault & Battery. The Juvenile & Domestic Relations Court immediately issued an emergency protective order against Debtor and later finalized it as a two-year protective order. A few months later, Debtor was convicted of Assault & Battery against Prunty.

The Final Decree of Divorce was entered by the Circuit Court of Fauquier County, Virginia on September 13, 2006.

II. PROCEDURAL HISTORY

In June, 2007, Debtor filed a Chapter 7 bankruptcy case. In his Statement of Financial Affairs, he disclosed that he had signed two quitclaim deeds in August, 2006 for property titled in the names of Debtor and his ex-wife during their marriage.

The Chapter 7 Trustee filed an adversary proceeding seeking to set aside the quitclaim deeds to Prunty as a preferential transfer. Prunty and the

Chapter 7 Trustee filed a joint Stipulation of Facts, and each filed a Motion for Summary Judgment.

After oral argument, the Bankruptcy Court ruled that the quitclaim deeds to Prunty were preferences in violation of 11 U.S.C. 547 and granted summary judgment to the Trustee on that issue.

Prunty appealed the Bankruptcy Court's decision to the U.S. District Court. The latter upheld the Bankruptcy Court's ruling.

Prunty appealed the U.S. District Court's ruling to the U.S. Court of Appeals for the Fourth Circuit, which also upheld the Bankruptcy Court's ruling.

REASONS FOR GRANTING PETITION

I. *The Fourth Circuit's dismissal of Prunty's appeal conflicts with a prior ruling in the Fourth Circuit and with ruling in the Ninth Circuit, both of which gave full faith and credit to state court orders in family law cases.*

Prunty argues that the Bankruptcy Court was required to give full faith and credit to the state court's determination of the Debtor's rights in the

subject property as set forth in the Final Decree of Divorce.[1]

At least two federal circuits have addressed the issue of whether federal courts are bound by issues resolved by state court orders. Both federal courts gave full faith and credit to the state court orders on issues that later came before the Bankruptcy Court.

In the case of *In Re: Genovese*, 96 F.3d 1438 (4th Cir., 1996), the debtor and his wife had been involved in protracted custody and support litigation in New York. The New York court awarded the wife her attorney's fees as part of the support award. Wife subsequently registered the judgment in West Virginia and began enforcement proceedings. When debtor filed bankruptcy, he attempted to discharge the judgment for the attorney's fees on the grounds that it was not in the nature of support. The bankruptcy court ruled that it was not bound by the

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[1] In Prunty's appeal from the Bankruptcy Court to the District Court, Trustee argued in his brief that Prunty was raising this issue for the first time. The District Court accepted this statement and rejected Prunty's argument on those grounds. In her brief filed in the Court of Appeals, Prunty addressed this erroneous statement. She pointed out in the record where "full faith and credit" had been argued by Prunty's counsel during oral argument on the cross-motions for summary judgment in the trial court. A copy of the page from the transcript was included in the Appendix filed in the Court of Appeals. See Appendix at A-25. (Excerpt from Transcript filed in the Fourth Circuit.)

New York court's determination of whether the judgment was in the nature of support.

The Fourth Circuit reversed the bankruptcy court and ruled that the bankruptcy court was bound by the state court's determination of whether the debt was in the nature of support based on the doctrine of collateral estoppel.

In *In re Shawhan*, BAP No. NV-08-1049-JuKuK. (B.A.P. 9th Cir. 7/7/2008) (B.A.P. 9th Cir., 2008), the court reached the same conclusion using a *res judicata* analysis:

> *"The preclusive effect, if any, of the family court's rulings derives from principles of res judicata, which generally apply in bankruptcy proceedings. (Citations omitted.) The generic term of res judicata encompasses two doctrines: claim preclusion and issue preclusion. (Citation omitted.) Issue preclusion has more applicability here because debtor raised in the bankruptcy court common issues of fact and law regarding the validity of the divorce decree and the* ***division of community property that were already litigated and resolved in the family court.***
>
> *When determining the preclusive effect of a state court judgment, we must apply as a matter of full faith and credit the state's law of*

> *issue preclusion. (Citations omitted.) Under Nevada law, "[t]he general rule of issue preclusion is that if an issue of fact or law was actually litigated and determined by a valid and final judgment, the determination is conclusive in a subsequent action between the parties." (Citations omitted.) Application of the issue preclusion doctrine is appropriate when the following elements are met: (1) the issue decided in the prior litigation is identical to the issues presented in the current action; (2) the initial ruling was on the merits and became final; and (3) the parties against whom the judgment is asserted must have been a party or in privity with a party to the prior litigation. (Citations omitted.) Issue preclusion may apply even though the causes of action are substantially different, if the same fact issue is presented." (Emphasis added.)*

By refusing to be bound by the rulings of state courts on the same issues raised in subsequent bankruptcy cases, the Fourth Circuit is violating the full faith and credit clause of the U.S. Constitution.

II. The Debtor never had any interest in property that was purchased with Prunty's separate assets.

It is undisputed that a Debtor's interest in property must be determined by state law.[2]

It is also undisputed that Virginia law protects separate property from the claim of a non-owning spouse.[3]

It is also undisputed that 100% of the funds used to acquire the subject property came from Prunty's pre-marital assets (separate property). See Appendix at A-5, paragraph 18; A-8 through A-11.

By applying the Virginia statute to the undisputed facts of this case, it is clear that Debtor

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[2] *Schlossberg v. Barney*, 380 F.3d 174 (4th Cir., 2004): "A bankruptcy trustee...has the rights of a judicial lien creditor or bona fide purchaser, both of which can only assert the rights granted them under state law." See also *Brogan v. Brogan*, 31 Va.App. 769, 525 S.E.2d 618 (2000): "However, bankruptcy recognizes state property rights, and filing bankruptcy cannot give a debtor a greater interest in an asset than that which he owned pre-bankruptcy."

[3] § 20-107.3 of the Code of Virginia:
A. (1). Separate property is (i) all property, real and personal, acquired by either party before the marriage; ... (Emphasis added.)

had no interest in Prunty's separate property. If the Debtor had no interest in the property, then the Trustee does not have an interest in the property on Debtor's behalf.

The courts below have never explained how Debtor can now have an interest in Prunty's separate property when Virginia law states to the contrary.

The fact that at the time Prunty purchased the property it was titled in the names of Prunty and debtor as "tenants by the entirety" does not change the fact that the property was always Prunty's separate property.[4] The mere titling of the property in the names of both parties does not, under Virginia law, convert Prunty's separate assets to marital property.

Under Virginia law, there is no presumption of a gift if property is titled jointly. (See footnote 4.)

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[4] § 20-107.3 (A)(3)(h). Subdivisions A 3 d, e and f of this section shall apply to jointly owned property. No presumption of gift shall arise under this section where (i) separate property is commingled with jointly owned property; (ii) newly acquired property is conveyed into joint ownership; or (iii) existing property is conveyed or retitled into joint ownership. (Emphasis added.) For purposes of this subdivision A 3, property is jointly owned when it is titled in the name of both parties, whether as joint tenants, tenants by the entireties, or otherwise.

Under Virginia law, there is no presumption of a 50/50 division of assets during a divorce.[5]

Thus, none of the reasons relied on by the Court of Appeals supports its conclusion that the Debtor had an interest in Prunty's property.

III. Whether a Chapter 7 trustee may use 11 U.S.C. 544 to nullify the legal effect of "tenants by the entireties" in a deed held by Debtor and his non-debtor spouse?

The courts below erred because they upheld the Trustee's claim to rights in property that would not have been available to any of Debtor's creditors in real life.

11 U.S.C.A. § 544 gives a Chapter 7 trustee the rights and powers of a *bona fide* purchaser of real property from the debtor, "*against whom applicable law permits such transfer to be perfected,*" that obtains the status of a *bona fide* purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

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[5] "Under settled principles, Virginia law does not establish a presumption of equal distribution of marital assets." *(Emphasis added.) Papuchis v. Papuchis*, 2 Va.App. 130, 132, 341 S.E.2d 829, 831 (1986) (Emphasis in original).

In Virginia, only individuals married to each other may hold title to real estate as "tenants by the entirety (T/E).[6] The advantage of holding title as T/E is that creditors of only one spouse cannot attach the property.[7] Thus, joint debts can attach to T/E property, whereas, debts of only one spouse cannot.

Moreover, no interest in property held as T/E can be transferred by only one spouse. (See *Rogers*, footnote 6.) If parties become divorced, and if at the time of the divorce they hold title to real estate as

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[6] "It is settled that tenancies by the entirety are based upon the same four unities that support joint tenancies, that is, the unities of title, estate, time, and possession. However, it is also settled that tenancies by the entirety are supported by a fifth unity which they do not share with any other tenancy: the unity of marriage. That unity embodies the legal fiction that husband and wife are one. And it leads to the result that neither husband nor wife can by his or her sole act defeat the survivorship interest of the other spouse. Neither spouse can by separate act make an absolute disposition of property they hold as tenants by the entirety, nor can a judgment lien creditor of one spouse subject that property to the satisfaction of his lien." *Rogers v. Rogers*, 512 S.E.2d 821, 257 Va. 323 (Va., 1999).

[7] "It follows that the entirety is liable for the joint debts of both spouses and is reachable against them by proper process. 35 A.L.R. 144. But where a tenancy by the entirety in the fee simple is once created the property is completely immune from the claims of creditors against either husband or wife alone. (Emphasis added.) See Glenn on Fraudulent Conveyances and Preferences, Vol. 1, page 280." *Vasilion v. Vasilion*, 192 Va. 735, 66 S.E.2d 599 (Va., 1951).

T/E, only then is the T/E converted into a tenancy in common.[8] Only when ownership is converted to a tenancy in common can a creditor of one spouse attach the property.

In this case, Prunty and the Debtor held title to the real estate as T/E until August 13, 2006, while they were still married. Then, Debtor signed the deeds on August 13, 2006, transferring title to Prunty, individually. The Final Decree of Divorce was entered on September 13, 2006. Based on this chronology, title to the real estate was never converted to tenants in common. There was never any interest owned by Debtor that his creditors could attach.

There was no way, under Virginia law, for a *bona fide* purchaser from Debtor to perfect an interest in the property resulting from a transfer by Debtor because the Debtor was prohibited by law

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[8] § 20-111. Decree of divorce from bond of matrimony extinguishes contingent property rights: Upon the entry of a decree of divorce from the bond of matrimony, all contingent rights of either consort in the real and personal property of the other then existing, or thereafter acquired, including the right of survivorship in real or personal property title to which is vested in the parties as joint tenants or as tenants by the entirety, with survivorship as at common law, shall be extinguished, and such estate by the entirety shall thereupon be converted into a tenancy in common. (Emphasis added.)

from conveying any interest in the property without Prunty's consent.

By using his "strong arm powers," the Trustee may only recover an interest in property which the Debtor could have conveyed to a third party on the filing date.[9] As explained above, Debtor had no interest in the property on the filing date to convey to anyone due to operation of law.

IV. For the purposes of 11 U.S.C. 547(4), any interest in property is transferred when a contract is signed.

11 U.S.C. 101(54) defines a "transfer" as follows:

(54) The term "transfer" means -

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with -

(i) property; or

(ii) an interest in property.

Using the definition of a "transfer" in the Bankruptcy Code, Debtor disposed of any arguable

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[9] *In re: Reasonover*, 236 B.R. 219 (Bankr. E.D.Va., 1999): "Simply stated, the bankruptcy trustee is in the same position, with respect to real estate, as if he were a bona fide purchaser who bought the property from the debtor on the filing date and simultaneously perfected the transfer by recording a deed."

interest in the property in March, 2005 when he signed a Marital Agreement. There is nothing in the statute that limits a transfer of an interest in real property to the signing of a deed. To transfer title, one must execute a deed. However, a transfer of an interest in real estate occurs by the signing of a Marital Agreement.[10]

The transfer took place more than two years before the date Debtor filed his Chapter 7 case,[11] putting the date of the transfer beyond the reach of the Chapter 7 Trustee.

V. *If Debtor had refused to sign a quitclaim deed pursuant to a Marital Agreement after the date of divorce, would that refusal have given Prunty a "right to payment," thus turning the ex-wife into a creditor?*

11 U.S.C. §101 (10) defines a creditor as someone who has a claim against the Debtor. A

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[10] § 20-155. Marital agreements: Married persons may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses, except that such marital agreements shall become effective immediately upon their execution... (Emphasis added.)

[11] Debtor's current bankruptcy case was filed in June, 2007.

claim is defined as a right to payment or as an equitable claim resulting in a right to payment.[12]

In the parties' Marital Agreement, the parties stipulated that neither owed the other any debts and neither had any claim against the other.

Debtor did not list Prunty as a creditor on his Lists and Schedules.

Prunty was not one of the Debtor's creditors simply because the parties' Agreement required Debtor to sign a quitclaim deed.[13] Under Virginia

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[12] 11 U.S.C. §101 (5) The term "claim" means—

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. (Emphasis added.)

[13] See *In re: Skorich*, 482 F.3d 21 (1st Cir., 2007) where the state court ordered that the sales proceeds from the marital home were to be transferred to a court-controlled escrow account for distribution in accordance with future court orders. The state court later ordered all the proceeds to be awarded to the non-debtor spouse (wife). The Trustee attempted to avoid the transfer. The wife argued that she did not have a "claim" against the debtor. The court agreed. "Skorich's better argument—and the basis for the decisions by the bankruptcy and district courts

law, Debtor's refusal to sign the deed did not give Prunty a "right to payment." It only gave Prunty the right to have the state court use its contempt powers to force Debtor to sign the deeds; or, the state court could appoint a Special Commissioner to execute the deeds.[14] By reading the statute, one can see that the state court judge does not have the authority to

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below—is that her equitable interest in marital property is not a "claim" at all under section 101(5), because it is neither a "right to payment" (subsection (A)) nor a "right to an equitable remedy for breach of performance" (subsection (B))." (Emphasis added.)

[14] § 20-107.3 (K). The court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section, including the authority to:

1. Order a date certain for transfer or division of any jointly owned property under subsection C or payment of any monetary award under subsection D;

2. Punish as contempt of court any willful failure of a party to comply with the provisions of any order made by the court under this section;

3. Appoint a special commissioner to transfer any property under subsection C where a party refuses to comply with the order of the court to transfer such property;

4. Modify any order entered in a case filed on or after July 1, 1982, intended to affect or divide any pension, profit-sharing or deferred compensation plan or retirement benefits pursuant to the United States Internal Revenue Code or other applicable federal laws, only for the purpose of establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of the order. (Emphasis added.)

award Prunty a money judgment against Debtor, if he had refused to sign the deeds.

Nor would it have been possible to reopen the divorce case to seek a monetary judgment. A state court judgment in Virginia is final and unappealable after twenty-one days and not subject to modification, unless the right to do so is specifically reserved in the order.[15]

VI. Prunty was not an "insider" of the Debtor because she was not Debtor's relative; and because Prunty had to get a protective order against Debtor in conjunction with his conviction of domestic violence (Assault & Battery) against Prunty – all prior to the date the quitclaim deeds were signed.

Prunty was not an "insider" of the Debtor under the facts of this case. In the first place,

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[15] Rule 1:1 of the Rules of the Supreme Court of Virginia: All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge.

Prunty was not one of Debtor's relatives. 11 U.S.C. § 101 (31).

At the time the parties signed the Marital Agreement, they were adversaries.

Moreover, a few months after the parties signed the Marital Agreement, Debtor assaulted Prunty, and she obtained a protective order from the state court. A few months after that, the court convicted Debtor of Assault & Battery. Clearly, at the time of the criminal proceedings, the parties were adversaries.

When Debtor signed the deeds (after the divorce trial), the parties were adversaries.

Under no stretch of the imagination could Prunty be considered an insider.

VII. Prunty did not receive more than she would have in a Chapter 7 liquidation.

Prunty did not receive more than she would have in a Chapter 7 liquidation because she was not a creditor. There was no reason for her to participate in any hypothetical liquidation.

Stated another way, Prunty did not receive any of the Debtor's property. The quitclaim deeds

simply transferred title to Prunty of property that was hers all along.

CONCLUSION

The application of Virginia law to the transaction resulting in the execution of the quitclaim deeds by Debtor does not permit the Trustee to exercise his avoidance powers set forth in 11 U.S.C. § 544 and § 547.

The implications of rejecting the state court's resolution of the issue of Debtor's interest in the subject property results in a manifest injustice for Prunty. If the Trustee is not bound by the provisions of the parties' Marital Agreement incorporated into the Final Decree of Divorce, and if the Trustee is permitted to sell Prunty's real estate and take Debtor's "one-half interest" in the proceeds, then Prunty will have been denied her right to have her separate property allocated to her pursuant to the terms of the Virginia Equitable Distribution Statute. In other words, she will have been denied her day in court. The resulting injustice was not the outcome intended by Congress when drafting 11 U.S.C. § 547. The obvious intent of that statute was to permit the Trustee to marshal all of a debtor's assets and distribute them to his creditors. It cannot have been foreseen that the Trustee would seek to marshal assets of non-debtors and distribute those assets to the Debtor's creditors.

For these reasons, Petitioners respectfully request issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

Ann M. Callaway
Counsel for Petitioners
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Warrenton, VA 20186
(540) 349-4100
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VSB #29014

No. _____

In The Supreme Court of the United States

DEBORAH J. PRUNTY, *et al.*,

Petitioners,

v.

ROY M. TERRY, JR., CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

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UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division

In re: RICHARD D. PASCHALL,

Debtor.

Case No. 07-32048-KRH
Chapter 7

ROY M. TERRY, JR., CHAPTER 7 TRUSTEE,

Plaintiff,

v.

Adv. Proc. No. 08-03049

RICHARD D. PASCHALL,
DEBORAH J. PRUNTY,
formerly DEBORAH P. PASCHALL, and
THE DEBORAH J. PRUNTY LIVING TRUST,

Defendants.

STIPULATIONS OF FACT

COMES NOW Plaintiff Roy M. Terry, Jr. ("Plaintiff" or "Chapter 7 Trustee"), by counsel, and defendants Deborah J. Prunty, and the Deborah J.

Prunty Living Trust, by counsel, and stipulate as follows:

1. On June 3, 2007 (the "Petition Date"), Richard D. Paschall ("debtor") filed a voluntary petition seeking relief under Chapter 7 of the Bankruptcy Code.

2. Roy M. Terry, Jr. was appointed interim Chapter 7 Trustee and continues to serve in that capacity.

3. Deborah P. Paschall (nee Deborah J. Prunty)(hereinafter "Prunty") is and was at all relevant times the trustee of The Deborah J. Prunty Living Trust, dated June 26, 2002.

4. Debtor and Prunty were married on June 29, 2002.

5. Prunty is a Certified Public Accountant.

6. Debtor worked only intermittently during the marriage.

7. Debtor is a recovering alcoholic, and has a gambling problem.

8. During the course of the marriage, Prunty had to deposit premarital income (*i.e.*, deferred compensation and non-qualified retirement income) and premarital liquid assets into debtor and Prunty's joint bank account to pay bills.

9. Debtor did not contribute any premarital assets toward acquisition of any property during the marriage.

The 2003 Marital Agreement.

10. On or about February 8, 2003, Deborah Prunty Paschall and Richard David Paschall signed a Post-Marital Agreement (the "2003 Marital Agreement").

11. The 2003 Marital Agreement was prepared by debtor and was later superceded with the Marital Agreement, dated January 1, 2005.

The San Jose Property.

12. After eight to ten months of marriage, debtor informed Prunty that he wanted to move to Virginia.

13. On or about July 10, 2003, Prunty sold her separate property home of fifteen years (a residence commonly known as 40 Tillman Avenue, San Jose, California, 95126)(the "San Jose Property") for $630,000.00, netting proceeds of $586,285.73.

The Fauquier Property (aka Jocelyn Court).

14. In Fauquier County, Virginia, there is a certain piece of real property commonly known as 7104 Jocelyn Court, Warrenton, Virginia 20187 (the "Fauquier Property" or "Jocelyn Court").

15. On or about July 29, 2003, Prunty put down a deposit on the [unimproved] Fauquier Property using her separate property funds.

16. After temporarily living in Richmond, Virginia, debtor and family moved to Northern Virginia so debtor could start employment a month before completion of the residence on the Fauquier Property.

17. At closing on the Fauquier Property, Prunty paid cash using proceeds from her sale of the San Jose Property and other separate property investments.

18. Prunty paid 100% of the purchase price for the Fauquier Property from assets owned prior to the marriage to debtor.

19. By deed dated January 29, 2004, NVR, Inc. conveyed the Fauquier Property to debtor and Prunty (*i.e.*, "Richard D. Paschall and Deborah P. Paschall"), as tenants by the entirety, recorded February 2, 2004 in the Clerk's Office of the Circuit Court of Fauquier County, Virginia, in Deed Book 1081, Page 210-211.

20. On or about February 17, 2004, debtor and Prunty borrowed $250,000.00 from Southern Trust Mortgage, LLC, secured by a Deed of Trust, undated, recorded February 24, 2004 in the Clerk's Office of the Circuit Court of Fauquier County, Virginia, in Deed Book 1084, Page 846-864.

21. All of the loan proceeds (approximately $245,000) were deposited into debtor and Prunty's joint checking account. Part of the loan proceeds were then used to pay off debtor's unsecured debt, both premarital and marital.

22. Debtor also gave Prunty approximately $136,000 of the loan proceeds.

23. After receiving the loan proceeds, debtor became unemployed.

24. Prunty used at least $80,000 of the loan proceeds to pay marital bills after debtor quit his job.

25. All loan payments on the Fauquier Property have been timely paid and the Amortization Schedule produced by Prunty is reasonably accurate.

The Midlothian Property (aka Rosebay Forest property).

26. In Chesterfield County, Virginia, there is a certain piece of real property commonly known as 15018 Rosebay Forest Drive, Midlothian, Virginia 23112 (the "Midlothian Property" or "Rosebay Forest Drive") that was owned by Robert L. Morris, Jr. (debtor's step-father) and Barbara P. Morris (debtor's mother).

27. In the summer of 2004, debtor insisted that they purchase the Midlothian Property because debtor's mother and step-father wanted to sell it and buy another but could not qualify for a new loan if

they were still liable on the Midlothian Property loan.

28. Prunty and debtor agreed to purchase the Midlothian Property from debtor's mother and step-father.

29. Approximately $25,000.00 was spent, both pre-closing and post-closing, to repair and remodel the Midlothian Property so that it could be rented. More specifically,

(a) Pre-closing, a check dated July 21, 2004, from the Deborah J. Prunty Living Trust, made payable to "Richard + Deborah Paschall", in the amount of $15,000.00, was deposited into the joint account and ultimately provided funds used to finance repairs on the Midlothian Property.

(b) Pre-closing, a check dated August 23, 2004, from the Deborah J. Prunty Living Trust, payable to "Deborah P Paschall", in the

amount of $5,000.00, was deposited into the joint marital account, and the funds were ultimately used to finance additional repairs on the Midlothian Property.

(c) Post-closing, a check dated September 30, 2004, from the Deborah J. Prunty Living Trust, payable to "Rick + Debbie Paschall", in the amount of $5,000.00, was deposited in the joint account, and ultimately the funds were used to finance improvements on the Midlothian Property.

30. By deed dated September 1, 2004, Robert L. Morris, Jr. (debtor's step-father) and Barbara P. Morris (debtor's mother) conveyed the Midlothian Property to Richard D. Paschall and Deborah P Paschall, tenants by the entirety, recorded September 8, 2004, in the Clerk's Office of the Circuit Court of Chesterfield County, Virginia, in Deed Book 5955, Page 116-119.

31. At the closing on the Midlothian Property, which occurred on September 2, 2004, Prunty paid $42,767.26 cash from premarital assets in the Deborah J. Prunty Living Trust, and financed the balance by a $183,200.00 promissory note from Deborah P. Paschall to Southern Trust Mortgage, LLC.

32. The aforementioned promissory note was secured by a deed of trust, undated, from Deborah P. Paschall and Richard D. Paschall, recorded September 8, 2004, in the Clerk's Office of the Circuit Court of Chesterfield County, Virginia, in Deed Book 5955, Page 120-143.

33. The Form HUD-1 shows that the sellers were to receive net cash of $15,111.92 at closing. Debtor's step-father added some money to these proceeds, and pursuant to an agreement among the parties, gifted $17,000.00 to debtor, which in turn

debtor was supposed to pay to Prunty to repay for the repairs.

34. Debtor received the $17,000.00, but reneged on his agreement to pay to Prunty.

35. Prunty was never repaid for the $42,767.26 down-payment, nor the approximately $25,000 repairs and remodeling (i.e., $15,000 plus $5,000 plus $5,000).

36. All loan payments on the Midlothian Property have been timely paid and the Amortization Schedule produced by Prunty is reasonably accurate.

The 2005 Marital Agreement.

37. In January 2005, debtor and Prunty began discussing entering into a marital agreement to eliminate disagreements over money.

38. Debtor told Prunty that he would file for a divorce if Prunty did not sign a marital agreement.

39. On March 2, 2005, debtor and Deborah P. Paschall executed a Marital Agreement, dated January 1, 2005, that was prepared by debtor's attorney.

40. As of March 2, 2005, the deed for the Fauquier Property and the deed for the Midlothian Property were still titled in the names of Richard D. Paschall and Deborah P. Paschall.

41. The Marital Agreement provided that Deborah P. Paschall shall become the exclusive owner of the Fauquier Property and Midlothian Property (the "Properties"), that debtor shall relinquish his interest in the Properties to Deborah P. Paschall, and that debtor agreed to convey the Properties to Deborah Paschall by Quitclaim Deeds

to Debrorah [*sic*] Paschall, Trustee of The Deborah J. Prunty Living Trust, dated June 26, 2002.

42. At the time the Marital Agreement was signed, Paschall had a sole proprietorship known as "Autobarn Detailing".

43. On March 2, 2005, debtor was not insolvent.

The Buyout Agreement.

44. Immediately after signing the Marital Agreement, debtor was dissatisfied with its terms and insisted on entering into a buyout agreement that would require Prunty to pay cash to the debtor faster than provided in the Marital Agreement.

45. On March 31, 2005, debtor and Deborah P. Paschall signed a Buyout Agreement.

46. On March 31, 2005, Debtor was not insolvent.

47. Prunty paid debtor all sums due under the Marital Agreement and the Buyout Agreement.

The Divorce.

48. On July 24, 2005, debtor assaulted Prunty in their home.

49. On July 26, 2005, debtor threatened to kill Prunty.

50. On July 27, 2005, Prunty filed charges of assault and battery against debtor.

51. On July 27, 2005, the Fauquier County Juvenile & Domestic Relations District Court entered a preliminary protective order.

52. On July 28, 2005, debtor violated the protective order five times.

53. On August 10, 2005, the court entered a permanent (2-year) protective order.

54. On November 28, 2005, the court convicted debtor of Assault & Battery.

55. On January 30, 2006, Deborah P. Paschall filed for uncontested divorce in Fauquier County, Virginia.

56. Trial was held July 31, 2006 on the divorce.

57. Pursuant to the Marital Agreement, debtor and Deborah P. Paschall conveyed their interest in the Fauquier Property to The Deborah J. Prunty Living Trust dated June 26, 2002 by Quitclaim Deed, dated August 23, 2006, recorded August 25, 2006, in Deed Book 1230, Page 1033, in the Clerk's Office of the Circuit Court of Fauquier County, Virginia.

58. Pursuant to the Marital Agreement, debtor and Deborah P. Paschall conveyed their interest in the Midlothian Property to the Deborah J. Prunty Living Trust dated June 26, 2002 by Quitclaim Deed, dated August 23, 2006, recorded September 5, 2006, in Deed Book 7338, Page 0409,

in the Clerk's Office of the Circuit Court of Chesterfield County, Virginia.

59. By August 23, 2006, debtor had spent all the money paid to him by Prunty pursuant to the Marital Agreement and Buyout Agreement on "wine, Women, and song" and as of August 23, 2006 was insolvent.

60. On September 13, 2006, debtor and Deborah P. Paschall were divorced by a Final Decree of Divorce entered in Fauquier County Circuit Court.

61. The Final Decree of Divorce incorporated the Marital Agreement.

62. As of June 3, 2007 (the "Petition Date), the Final Decree of Divorce was recorded in the "Law Order Books" and/or in the "Chancery Order Books" located in the records room of the Clerk's Office of the Circuit Court of Fauquier County, Virginia.

63. As of June 3, 2007 (the "Petition Date), the Final Decree of Divorce was not recorded in the

grantor/grantee index of the land records of the Clerk's Office of the Circuit Court of Fauquier County, Virginia.

64. As of June 3, 2007 (the "Petition Date"), the Final Decree of Divorce was not recorded in the land records of the Clerk's Office of the Circuit Court of Chesterfield County, Virginia.

65. As of June 3, 2007 (the "Petition Date"), the 2005 Marital Agreement was not recorded in the land records of the Clerk's Office of the Circuit Court of Fauquier County, Virginia, but was incorporated into the Final Decree of Divorce that was recorded in the Chancery Order Books.

66. As of June 3, 2007 (the "Petition Date"), the 2005 Marital Agreement was not recorded in the land records of the Clerk's Office of the Circuit Court of Chesterfield County, Virginia.

67. Subsequent to the divorce, the Deborah J. Prunty Living Trust dated June 26, 2002

conveyed its interest in the Fauquier Property to Deborah J. Prunty, formerly known of record as Deborah J. Paschall, by Deed of Distribution, dated October 18, 2006, recorded November 8, 2006, in Deed Book 1241, Page 598, in the Clerk's Office of the Circuit Court of Fauquier County, Virginia.

68. Subsequent to the divorce, the Deborah J. Prunty Living Trust dated June 26, 2002 conveyed its interest in the Midlothian Property to Deborah J. Prunty, formerly known of record as Deborah J. Paschall, by Deed of Distribution, dated October 18, 2006, recorded December 5, 2006, in Deed Book 7509, Page 160, in the Clerk's Office of the Circuit Court of Chesterfield County, Virginia.

69. Prunty gave no consideration to the Deborah J. Prunty Living Trust for the transfer of the Fauquier Property from the Deborah J. Prunty Living Trust to Prunty.

70. Prunty gave no consideration to the Deborah J. Prunty Living Trust for the transfer of the Midlothian Property from the Deborah J. Prunty Living Trust to Prunty.

71. If the transfers are avoided, Prunty is not claiming any "right of contribution" from the debtor in this adversary proceeding.

The Two Bankruptcy Cases.

72. On October 29, 2006, Richard D. Paschall filed a petition (with statements and schedules) seeking relief under Chapter 13 of the Bankruptcy Code (the "Chapter 13 Petition").

73. By order entered May 24, 2007, the Chapter 13 bankruptcy case was dismissed.

74. On June 3, 2007 (the "Petition Date"), Richard D. Paschall filed the current voluntary petition seeking relief under Chapter 7 of the Bankruptcy Code.

Respectfully submitted, this the 23rd day of December, 2008.

\s\ John C. Smith
Roy M. Terry, Jr., VSB No. 17764
John C. Smith, VSB No. 44556
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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2008, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which

will send notification of such filing to the following:

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Ann M. Callaway, P.C.
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Warrenton, VA 20186
Counsel for Deborah J. Prunty and
Deborah J. Prunty Living Trust

Roy M. Terry, Jr., Esquire
DurretteBradshaw, P.C.
600 E. Main St., 20th Floor
Richmond, VA 23219
Chapter 7 Trustee

And I hereby certify that I have mailed the document by U.S. mail to the following non-filing users:

Richard Paschall
5816 Quiet Pine Cir. Apt. 304
Chester, VA 23831
Debtor

\s\ John C. Smith

UNITED STATES BANKRUPTCY COURT
EASTERN DISTRICT OF VIRGINIA

IN RE:

RICHARD D. PASCHALL, Case No. 07-32048KRH

Debtor.

ROY TERRY, TRUSTEE,

Plaintiff,

v. Adv. No. 08-03049KRH

RICHARD D. PASCHALL,

Defendant. January 8, 2009
10:03 a.m.

TRANSCRIPT OF HEARING
BEFORE HONORABLE KEVIN R. HUENNEKENS
UNITED STATES BANKRUPTCY COURT JUDGE

APPEARANCES:

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P. 45 of Transcript

1 with the whole idea of re-litigating equitable distribution.
2 If — the finality of the divorce decree, if it's not final, if
3 it's not dispositive of the property issues between these
4 parties, then we've got to start all over. But I think that it
5 is dispositive because, as Mr. Smith said, yes, it's got to be

6 the same parties or a privy.
7 I think the trustee absolutely stands in the shoes of
8 the debtor foursquare on this issue. I mean, yes, does the
9 trustee have -- do other things other than what was -- what
10 would be going on in an equitable distribution hearing on the
11 ownership of interest in these properties? Sure. But for the
12 purposes of this case the trustee is wearing Rick Paschall's
13 hat, and he is stepping into his shoes and saying, okay, we've
14 got these two pieces of property, now how much of it would Rick
15 have gotten had we gone and had an E.D. trial rather than sign
16 an agreement? He definitely, in privity with Rick Paschall.
17 It's the same issue. What is his interest in the property?
18 And because of that, that issue, answer, none, zero interest,
19 there's nothing for the trustee to get because that issue has
20 already been settled, bargained away. Mr. Paschall got the
21 money, spent it, and that should be upheld.

I read some of the federal cases on the issue of collateral estoppel and the state -- Federal Courts having to recognize full faith in credit, the State Court rulings, and so on and so forth, and, you know, there are some exceptions

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

IN RE:
RICHARD D. PASCHALL, Case No. 07-32048

Debtor. Chapter 7

ROY M. TERRY, JR., Chapter 7 Trustee,

Plaintiff,

v. Adv. Proc. No. 08-03049

RICHARD D. PASCHALL,
DEBORAH J. PRUNTY (f/k/a Deborah P. Paschall)
and
THE DEBORAH J. PRUNTY LIVING TRUST,

Defendants.

MEMORANDUM OPINION

Before the Court are the cross-motions of Roy M. Terry, Jr. (the "Trustee") and Deborah J. Prunty

("Prunty")[1] (together the "Parties") for summary judgment. The question presented herein is whether the Trustee can avoid the transfer of two parcels of real property from Richard D. Paschall (the "Debtor") and Prunty as tenants by the entirety to one of the defendants, The Deborah J. Prunty Living Trust dated June 26, 2002 (the "Trust"), under 11 U.S.C. § 547. Hearing was conducted on January 8, 2009 (the "Hearing"), at which counsel for the Trustee and counsel for Prunty and the Trust presented argument on the cross-motions for summary judgment. At the conclusion of the Hearing, the Court announced its decision to grant summary judgment in favor of all three of the Defendants[2] on Counts II, III and IV of the Complaint filed by the Trustee (the "Complaint"). The Court took under advisement the cross-motions for summary judgment with regard to Counts I (§ 547 Avoidable Preferences), Count V (§ 550

---

[1] Prunty was formerly known as Deborah P. Paschall while she was married to Richard D. Paschall, the Debtor.

[2] The Debtor is a co-defendant who appeared and participated at the Hearing pro se. The Court finds that no interest of the Debtor is affected or otherwise involved in connection with the relief afforded herein.

Transferee Liability), and Count VI (§ 363(h) Sale of Co-owned Properties) of the Complaint.

This Memorandum Opinion sets forth the Court's findings of fact and conclusions of law pursuant to Rule 7052 of the Federal Rules of Bankruptcy Procedure.[3] The Court has subject-matter jurisdiction of this adversary proceeding pursuant to 28 U.S.C. §§ 157(a) and 1334 and the general order of reference from the United States District Court for the Eastern District of Virginia dated August 15, 1984. This is a core proceeding under 28 U.S.C. § 157(b)(2)(F), (K) and (0) in which final orders or judgments may be entered by a bankruptcy judge. Venue is appropriate in this Court pursuant to 28 U.S.C. § 1409(a).

Issues Presented

The Trustee contends that he is entitled to summary judgment because the execution of two quitclaim deeds by the Debtor and Prunty were transfers of an interest of the Debtor in property.

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[3] Findings of fact shall be construed as conclusions of law and conclusions of law shall be construed as findings of fact when appropriate. See Fed. R. Bankr. p. 7052.

The Trustee maintains that, for purposes of § 547 of the Bankruptcy Code, the transfers occurred on the date that the quitclaim deeds were executed. The transfers of the two properties were to or for the benefit of Prunty who was a creditor. The Trustee argues that the transfers of the two properties were for or on account of an antecedent debt owed by the Debtor before the transfers were made. The challenged transfers were made while the Debtor was insolvent. The Trustee contends that Prunty was an insider of the Debtor at the time that the transfers of the properties occurred. Finally, the Trustee maintains that the challenged transfers were made within the one-year period preceding the Petition Date, they enabled Prunty to receive more than she would otherwise receive in this Chapter 7 case, and Prunty was the entity for whose benefit the transfers were made.

Prunty argues that she is entitled to summary judgment on all counts because the Debtor had no interest in the properties that were transferred to her. She maintains that she was not a creditor of the Debtor and that the transfers were not on account of antecedent debt. Finally, Prunty argues that she

should not be deemed to be an insider of the Debtor.

Undisputed Facts

The facts pertinent to Counts I and V of the Complaint are undisputed.[4] Prunty married the Debtor on June 29, 2002. On February 8, 2003, Prunty and the Debtor signed a Post-Marital Agreement (the "2003 Marital Agreement"). The 2003 Marital Agreement was later superseded with the Marital Agreement dated January 1, 2005 (the "2005 Marital Agreement"). On October 29, 2006, the Debtor filed a petition seeking relief under Chapter 13 of the Bankruptcy Code. By Order entered May 24, 2007, the Chapter 13 bankruptcy case was dismissed. On June 3, 2007 (the "Petition Date"), the Debtor filed the current voluntary petition under Chapter 7 of the Bankruptcy Code. The Trustee was appointed originally as interim Chapter 7 trustee and he continues to serve now as trustee in the bankruptcy case. The Trustee commenced this adversary proceeding on April 4, 2008, seeking to the avoid the transfers of the Properties as preferential under 11 U.S.C. §547 (Count I), to recover the

---

[4] The Parties entered into a Stipulation of Facts on December 23, 2008.

Properties or their value into the bankruptcy estate under 11 U.S.C. § 550 (Count V), and finally to sell the Properties under 11 U.S.C. § 363(h) (Count VI).

Prunty sold her separate property, a home located at 40 Tillman Avenue, San Jose, California (the "San Jose Property") on July 10, 2003. She received $586,285.73 from the sale. Two weeks later, Prunty put a deposit down on a piece of real property at 7104 Jocelyn Court, Warrenton, Virginia (the "Fauquier County Property"). After temporarily livng in Richmond, Virginia, the Debtor and Prunty moved to norther Virginia so that the Debtor could begin new employment. A month later the residence on the Fauquier County property was completed. Prunty paid cash at closing for the Fauuier County Property using the proceeds she had received from the sale of the San Jose Property and other separate property investments. Prunty paid 100% of the purchase price for the Fauquier Count Property from assets that she owned prior to the marriage. By deed dated January 29, 2004, the Fauquier County Property was conveyed to the Debtor and Prunty as tenants by the entirety. The deed was recorded February 2, 2004, in the Clerk's Office of the Circuit

Court of Fauuier County, Virginia (the "Fauquier County Clerk's Office"), in deed book 1081, at page 210-211.

On or about February 17, 2004, the Debtor and Prunty borrowed $250,000 from Southern Trust Mortgage, LLC. The loan was secured by a deed of trust recorded February 24, 2004, in the Fauquier County Clerk's office, in deed book 1084 at pages 846-864. The loan proceeds were deposited into a joint checking account of the Debtor and Prunty. A portion of the loan proceeds was used to pay off the Debtor's unsecured debt, both premarital and marital. The Debtor gave Prunty $136,000 of the loan proceeds.

In the summer of 2004, the Debtor insisted that he and Prunty purchase the real property at 15018 Rosebay Forest Drive, Midlothian, Virginia 23112 ("the Midlothian Property"). This property was owned by the Debtor's mother and stepfather. The Debtor's mother wanted to buy another property, but was not able to qualify for a new loan if she was still liable on the loan for the Midlothian Property. Prunty and the Debtor agreed to purchase the Midlothian Property from the Debtor's mother

and stepfather. Approximately $25,000 was spent both pre-closing and post-closing to repair and to remodel the Midlothian Property so that it could be rented. By deed dated September 1, 2004, the Debtor's mother and stepfather conveyed the Midlothian Property to the Debtor and Prunty as tenants by the entirety. The deed was recorded on September 8, 2004, in the Clerk's Office of the Circuit Court of Chesterfield County, Virginia (the "Chesterfield County Clerk's Office"), in deed book 5955, pages 116-119. Prunty paid $42,767.26 from premarital assets at closing on the Midlothian Property and financed the balance by a $183,200 promissory note from Prunty to Southern Trust Mortgage LLC. The note was secured by a deed of trust from the Debtor and Prunty recorded September 8, 2004, in the Chesterfield County Clerk's Office, in deed book 5955, pages 120-143.

The Debtor and Prunty executed the 2005 Marital Agreement on March 2, 2005. As of March 2, 2005, the Fauquier County Property and Midlothian Property were still titled in the names of the Debtor and Prunty, as tenants by the entirety. The 2005 Marital Agreement provided that Prunty

would become the exclusive owner of both the Fauquier County Property and the Midlothian Property (together, the "Properties"). The Debtor agreed to convey his interest in the Properties to Prunty by quitclaim deeds to Prunty as Trustee of the Trust in exchange for certain cash payments. The Debtor was not insolvent on March 2, 2005.

After signing the 2005 Marital Agreement, the Debtor became dissatisfied with its terms and insisted on entering into a buyout agreement that would require Prunty to pay cash to the Debtor faster than provided in the 2005 Marital Agreement. On March 31, 2005, the Debtor and Prunty signed a Buyout Agreement. The Debtor was not insolvent on March 31, 2005. Prunty paid the Debtor all sums due under the 2005 Marital Agreement and the Buyout Agreement (together, the "Marital Agreements").

On January 30, 2006, Prunty filed for uncontested divorce in Fauquier County, Virginia. Trial was held July 31, 2006, on the divorce proceeding. Pursuant to the Marital Agreements, the Debtor and Prunty conveyed their interest in the Fauquier County Property to the Trust by quitclaim

deed dated August 23, 2006. The deed was recorded August 25, 2006, in deed book 1230, page 1033, in the Fauquier County Clerk's Office. Also pursuant to the Marital Agreements, the Debtor and Prunty conveyed their interest in the Midlothian Property to the Trust by a quitclaim deed dated August 23, 2006. This deed was recorded September 5, 2006, in deed book 7338, page 0409, in the Chesterfield County Clerk's Office. By the time both of these deeds were executed and recorded, the Debtor had spent all the money paid to him by Prunty pursuant to the Marital Agreements, and the Debtor was insolvent.

The Debtor and Prunty were divorced by a final decree of divorce entered in Fauquier County Circuit Court on September 13, 2006 (the "Final Decree of Divorce"). The Final Decree of Divorce incorporated the 2005 Marital Agreement. The Final Decree of Divorce was recorded in the law order books and/or in the chancery order books located in the records room of the Fauquier County Clerk's Office, but not until the Petition Date. The Final Decree of Divorce was never recorded in the grantor/grantee index of the land records of the Fauquier County Clerk's Office, nor was it recorded

in the land records of the Chesterfield County Clerk's Office. The 2005 Marital Agreement also was never recorded in the land records of either the Fauquier County Clerk's Office or the Chesterfield County Clerk's Office. By deed of distribution dated October 18, 2006, and recorded November 8, 2006, in deed book 1241, page 598, in the Fauquier County Clerk's Office, the Trust conveyed its interest in the Fauquier County Property to Prunty. By deed of distribution dated October 18, 2006, recorded December 5, 2006, in deed book 7509, page 160, in the Chesterfield County Clerk's Office, the Trust conveyed its interest in the Midlothian Property to Prunty. Prunty gave no consideration to the Trust for the transfer of either of the Properties.

Discussion

The standard for entry of summary judgment is well established. Summary judgment will be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c) (as incorporated by Fed. R. Bankr. P. 7056).

A party moving for summary judgment bears the initial burden of demonstrating that there is no genuine issue of material fact. See *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). In determining whether this showing has been made, the court must assess the evidence in the light most favorable to the party opposing the motion. See, e.g., *Charbonnages de France v. Smith*, 597 F.2d 406, 414 (4th Cir. 1979). Summary judgment is appropriate only where there are no "disputes over facts that might affect the outcome of the suit," not mere peripheral or irrelevant facts. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). The United States Court of Appeals for the Fourth Circuit has previously ruled that summary judgment should not be granted "even where there is no dispute as to the evidentiary facts in the case but only as to the conclusions to be drawn therefrom." *Pierce v. Ford Motor Co.*, 190 F.2d 910, 915 (4th Cir. 1951). The court in *Pierce* thus set out an elevated standard for summary judgment based on its concern that premature entry of summary judgment may deprive litigants of their right to trial. The court explained that summary judgment was appropriate where it was apparent that no issue of

fact was necessary "to clarify the application of the law." *Pierce*, 190 F.2d at 915. The facts of this case readily satisfy the heightened standard for summary judgment in *Pierce*. As both Parties have filed motions for summary judgment, neither party will be deprived of a right to trial if summary judgment is entered against either one or the other of them.

If the moving party demonstrates that there is no genuine issue of material fact, the burden shifts to the nonmoving party to produce evidence to demonstrate that there is indeed a genuine issue for trial. Fed. R. Civ. P. 56(e)(2) ("When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by affidavits or as otherwise provided in this rule— set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party."); see also *RGI, Inc. v. Unified Indus., Inc.*, 963 F.2d 658 (4th Cir. 1992). Summary judgment "is favored as a mechanism to secure the 'just, speedy and inexpensive determination' of a case" when the requirements of

Rule 56 are met. *Thompson Everett, Inc. v. Na'l Cable Adver.*, L.P., 57 F.3d 1317, 1322-23 (4th Cir. 1995) (quoting Fed. R. Civ. P. 1). The Parties assert that summary judgment is appropriate in this case because there is no dispute as to any material fact regarding the subject transactions.

Count I

The trustee has the burden of proving the avoidability of the transfers under § 547(b) of the Bankruptcy Code, and Prunty has the burden of proving the nonavoidability of the transfers under § 547(c) of the Bankruptcy Code. 11 U.S.C. § 547(g).

The Trustee contends that the transfers of the Debtor's interest in the two Properties from the Debtor and Prunty, as tenants by the entirety, to the Trust and then ultimately to Prunty individually were avoidable preferences under 11 U.S.C. § 547. That section provides in relevant part that:

> The trustee may avoid any transfer of an interest of the debtor in property-
> 1) to or for the benefit of a creditor;
> 2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
> 3) made while the debtor was insolvent;

4) made —
   A. on or within 90 days and one year before the date of filing the petition;
   B. between 90 days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
5) that enables such creditor to receive more than such creditor would receive if
   A. the case were a case under chapter 7 of this title;
   B. the transfer had not been made; and
   C. such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b).

The Trustee maintains that the execution, delivery and recordation of the two quitclaim deeds constitute a "transfer of an interest of the debtor in property." 11 U.S.C. § 547(b). The term "transfer," as employed in the Bankruptcy Code, is an extremely broad concept. "'[T]ransfer' means each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with an interest in property." See 11 U.S.C. § 101(54)(D). The term "transfer" encompasses every means and manner by which property can pass from ownership and possession of another, and any transaction that

reduces or extinguishes valuable legal rights is subject to avoidance. See *Weaver v. Kellogg*, 216 B.R. 563, 573 (S.D. Tex. 1997) (citing 11 U.S.C. § 101(54), and *Besing v. Hawthorne* (*In re Besing*), 981 F.2d 1488, 1492 (5th Cir. 1993) (quoting *Pirie v. Chicago Title & Trust Co.*, 182 U.S. 438 (1901))).

An "interest of the debtor in property" is not defined by the Bankruptcy Code. *Matson v. Grease Monkey Int'l, Inc.* (*In re BEV of Va., Inc.*), 237 B.R. 311, 314 (Bankr. E.D. Va. 1998). The nature of the Debtor's interest in the Properties is governed by state law. *Id.* (citing *Am. Bankers Ins. Co. of Fla. v. Maness*, 101 F.3d 358, 363 (4th Cir. 1996) (quoting *Butner v. United States*, 440 U.S. 48, 55 (1979))); see also *McKenzie v. Irving Trust Co.*, 323 U.S. 365, 369-70 (1945) (explaining that although what constitutes a transfer and when it is complete is a federal question, in the absence of any controlling federal statute a creditor or bona fide purchaser must prove that he acquired rights in the property transferred by the debtor by virtue of a state law).

Prunty argues that the 2005 Marital Agreement transferred equitable title in the Properties to her and that the quitclaim deeds

merely transferred legal title. She argues that Debtor's obligation to convey his interests in the Properties to her had been judicially recognized pre-petition in the Final Decree of Divorce, which incorporated the 2005 Marital Agreement. Citing *Brogan v. Brogan*, 31 Va. App. 769, 525 S.E.2d 618 (2000) and 11 U.S.C. § 541(d), Prunty argues that property in which the Debtor holds only bare legal title and not an equitable interest becomes property of the estate under subsection § 541 (a)(1) or (a)(2) of the Bankruptcy Code only to the extent of the Debtor's legal title to the property and not to the extent of any equitable interest the Debtor does not hold.

Prunty's augments are misplaced. First, the limitation found in § 541(d) of the Bankruptcy Code on the Debtor's interest in property applies only to § 541(a)(1) and (2) of the Bankruptcy Code. It does not apply to § 541(a)(3) and (4) of the Bankruptcy Code, which allow trustees to bring into the bankruptcy estate property recovered from avoidable transfers. *Mayer v. United States* (*In re Reasonover*), 236 B.R. 219, 228 (Bankr. E.D. Va. 1999). "Section 541(d) ...does not, expressly or by fair implication, limit or

abrogate the trustee's ability to recover property under his avoidance powers simply because the debtor has no equitable interest in that property." Id. Second, deeds to real estate and contracts to sell real estate are void as to lien creditors except from the time that the instrument is recorded in the county or the city in which the property lies. Va. Code Ann. §55-96; see also *Tribby v. Tribby*, No. C-91-98, 1992 Va. Cir. LEXIS 132 (Feb. 27, 1992).

The 2005 Marital Agreement is a contract "made in respect to real estate . . . or made for the conveyance or sale of real estate" under Va. Code Ann. § 11-1. The 2005 Marital Agreement was never recorded in the land records of either Fauquier County or Chesterfield County. Because it was not recorded, it is void as against the Debtor's judgment creditors under Virginia Code § 55-96. *Tribby*, 1992 Va. Cir. LEXIS 132, at 4-5. The Trustee is deemed to be a hypothetical lien creditor under Bankruptcy Code § 544(a)(1), and a hypothetical bona fide purchaser of the real estate under Bankruptcy Code § 544(a)(3), as of the Petition Date. See *Phillips v. Chandler*, 215 B.R. 684, 686, 689 (E.D. Va. 1997) (holding an unrecorded divorce decree is not capable

of blocking a Chapter 7 bankruptcy trustee's hypothetical lien claim against real property transferred by that divorce decree). While the unrecorded 2005 Marital Agreement was binding upon the Debtor and Prunty *inter se*, it had absolutely no effect upon their third party creditors, including the Trustee as a hypothetical lien creditor.

The Debtor owned an undivided one-half interest in the Properties prior to the transfers. See *Sundin v. Klein*, 221 Va. 232, 241, 269 S.E.2d 787, 792 (1980). Even though Prunty may have paid the full price for the Properties held in the entirety estate, it is presumed that she made a gift to her cotenant of an undivided one-half interest in the Properties. See *id*. The quitclaim deeds transferred that interest of the Debtor in the Properties to Prunty.

Notwithstanding that the initial transfer of each of the Properties was to the Trust, which then transferred the Property to Prunty, the challenged transfers were to or for the benefit of Prunty. See 5 Collier on Bankruptcy ¶ 550.02[4][a], at 550-19 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) (citing *Kupetz v. United States* (In *re Cal.*

Trade Technical Schs., Inc.), 923 F.2d 641 (9th Cir. 1991) (holding entity was an initial transferee where entity was the beneficiary of the trust fund that received the initial transfer)).

Prunty was a creditor of the Debtor at the time of the transfers. At the time the Debtor transferred the Properties to Prunty, he was obligated to do so under the terms of the 2005 Marital Agreement.[5] That obligation to transfer the Properties, which was legally enforceable, rendered Prunty a creditor of the Debtor. The Bankruptcy Code defines the word "creditor" to mean any "entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor." 11 U.S.C. § 101(10)(A). The word "claim" is defined broadly by the Bankruptcy Code either as (A) a right to payment-whether or not such right is reduced to judgment, liquidated, unliquidated, fixed,

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[5] The 2005 Marital Agreement stated: "The parties agree that the Wife shall become the exclusive owner of such property and that the Husband shall relinquish his interest in the marital property to the Wife. Husband agrees to convey to the Wife by quitclaim deed all of his right, title and interest in said property to Deborah Paschall, Trustee of the Deborah J. Prunty Living Trust dated June 26, 2002." 2005 Marital Agreement, at para. 15(a)(2).

contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or (B) a right to an equitable remedy for breach of performance if such breach gives rise to a right to payment-whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured. 11 U.S.C. § 101(5)(A), (B); see also *Callahan v. Petro Stopping Ctr. #72* (*In re Lambert Oil Co.*), 347 B.R. 173, 179 (W.D. Va. 2006).

The Bankruptcy Code governs the time when the transfers are deemed to have occurred. First, § 547 provides that "[a] transfer of real property . . . is perfected when a bona fide purchaser of such property from the debtor . . . cannot acquire an interest that is superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(A). Under this provision, perfection is the key to determining when a § 547 transfer occurred. That determination must be made by reference to state law. Virginia recording statutes provide that contracts in writing and deeds are "void to all purchasers for valuable consideration without notice not parties thereto. . . until and except from the time it is duly admitted to record. . .

." Va. Code Ann. § 55-96.[6] The transfers were perfected when the quitclaim deeds were recorded.

Second, the time lapse between the execution of the quitclaim deeds transferring the Properties and the date upon which the deeds were recorded determines when the transfers will be deemed to have occurred. Bankruptcy Code § 547(e)(2) provides in relevant part:

For the purposes of this section. . . a transfer is made -

> *A. at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time...*

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[6] The Virginia Code provides in relative part:

§ 55-96. Contracts, etc., void as to creditors and purchasers until recorded; priority of credit line deed of trust.

A. 1. Every (i) such contract in writing, (ii) deed conveying any such estate or term, (iii) deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels and (iv) such bill of sale, or contract for the sale of goods and chattels, when the possession is allowed to remain with the grantor, shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record in the county or city wherein the property embraced in such contract, deed or bill of sale may be.

Va. Code Ann. § 55-96.

B. at the time such transfer is perfected, if such transfer is perfected after such 30 days; or
C. immediately before the date of the filing of the petition, if such transfer is not perfected at the later of
    i. the commencement of the case; or
    ii. 30 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2) (emphasis added). As the quitclaim deeds for the Properties were perfected by recordation within 30 days after the deeds were executed, the transfer of Debtor's interests in the Properties occurred on August 23, 2006 - the date upon which the quitclaim deeds were executed. The transfer of the two Properties did not occur, as Prunty contends, upon execution of the 2005 Marital Agreement.

Although the transfers did not occur upon execution of the 2005 Marital Agreement, the transfers were made pursuant to the Debtor's obligation under the 2005 Marital Agreement. The challenged transfers were thus for or on account of an antecedent debt[7] owed by the Debtor prior to the

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[7] The term "debt" means liability on a claim. 11 U.S.C. § 101(12).

transfers because the 2005 Marital Agreement was executed on March 2, 2005 and the transfers occurred on August 23, 2006. The Parties stipulated that the Debtor was insolvent on August 23, 2006.

The transfer of the Properties occurred within the one-year period preceding the Petition Date. For purposes of § 547 of the Bankruptcy Code, Prunty is an insider of the Debtor. The insider relationship is determined as of the date of the transfer of the Properties. *Dent v. Martin*, 86 B.R. 290, 292 (S.D. Fla. 1988) ("The language of [Bankruptcy Code] section 547(b)(4)(B) clearly states that an insider relationship is to be determined on the exact date of the challenged transfer." (quoting *McWilliams v. Gordon* (*In re Campo Rockhill, Inc.*), 12 B.R. 829, 834 (Bankr. E.D. Pa. 1981) (emphasis in original))); 2 Collier on Bankruptcy ¶ 101.31, at 101-143 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) ("Such creditor must be an insider at the time of the transfer in order for the trustee to avoid the transfer."). The facts that Prunty and the Debtor were later divorced and that they were divorced as of the Petition Date are of no moment.

As Prunty was married to the Debtor at the

time of the transfer of the Properties, she was an insider of the Debtor. The term "insider" is defined to include "a relative of the debtor." See 11 U.S.C. § 101(31)(A)(i). Section 102(3) of the Bankruptcy Code provides that the term "includes" is not limiting. The term "relative" is then defined as an "individual related by affinity or consanguinity within the third degree as determined by common law." 11 U.S.C. § 101(45). The meaning Congress sought to ascribe to the term "relative" is discussed in the legislative history of the Bankruptcy Code:

> A. former spouse is not a relative, but if, for example, for purposes of the preference section, proposed 11 U.S.C. 547(b)(4)(B), the transferee was a spouse of the debtor at the time of the transfer sought to be avoided, then the transferee would be a relative and subject to insider rules, even if the transferee were no longer married to the debtor at the time of commencement of the case or at the time of the commencement of the preference proceeding.

Sumski v. Daggett (In re Hoxie), No. 02-1127-JMD, 2003 Bankr. LEXIS 950, at *8-9 (Bankr. D.N.H. July 24, 2003) (quoting H.R. Rep. No. 95-595, at 313 (1977); S. Rep. No. 95-989, at 26 (1978)). "A spouse of

the debtor is a relative as defined by section [101(45)] because the definition includes individuals 'related by affinity." *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 585 (B.A.P. 9th Cir. 1987); accord 2 Collier on Bankruptcy ¶ 101.45, at 101-184 ("The definition of 'relative' does not explicitly state 'and shall include the spouse' as did paragraph (27) of the former Act. The phrase is unnecessary as an 'individual related by affinity' describes an individual related by marriage - thus, the individual's spouse is, of course, included. However, a former spouse will not be considered a relative, as the definition should be applied as of the time the transaction took place. But if, for example, the transferee of an alleged preferential transfer was still a spouse at the time of the transfer sought to be avoided, then the transferee would be deemed an "insider" and the trustee would have the power to avoid such a transfer.").

Finally, the transfer of the two Properties enabled Prunty to receive more than she otherwise would receive in this Chapter 7 case if the transfer had not been made, and if she receives payment of her claim to the extent provided by the provisions of

the Bankruptcy Code. The Trustee has established that (1) Prunty is an unsecured creditor because she did not record the 2005 Marital Agreement or Final Decree of Divorce; (2) debts arising from property settlement agreements are not priority claims; and (3) the estate will not distribute a 100% payout to unsecured creditors. See *Matson v. Grease Monkey Int'l, Inc. (In re BEV of Virginia, Inc.)*, 237 B.R. 311, 315 (Bankr. E.D. Va. 1998) (holding that if a trustee establishes those three elements, he has satisfied section 547(b)(5)). Accordingly, the requirements of 11 U.S.C. § 547(b)(5) have been met in this case.

The Trustee has satisfied all of the elements of § 547(b) of the Bankruptcy Code to establish that the transfers of the two Properties from the Debtor and Prunty to Prunty are avoidable preferences. Prunty has failed to show that any of the defenses under 11 U.S.C. § 547(c) are available to her. Accordingly, the Trustee is entitled to summary judgment on Count I of his Complaint. Prunty's cross motion for summary judgment as to Count I will be denied.

Count V

In Count V of his Complaint, the Trustee seeks to restore the estate to the financial condition it would have enjoyed had the transfers not occurred. Section 550 of the Bankruptcy Code allows the Trustee, once he has avoided the transfers of the two Properties, to recover either the Properties or their value from the initial transferee or from the person for whose benefit the transfer was made. See 11 U.S.C. § 550(a)(1), (2). "To 'avoid,' in the legal context, means 'to render void." *Coleman v. Cmty. Trust Bank*, 426 F.3d 719, 726 (4th Cir. 2005) (quoting Black's Law Dictionary 146 (8th ed. 2004)). The Trustee's avoidance of the transfers of the two Properties by quitclaim deeds as preferential transfers reverts title to the Properties in the Debtor and Prunty as tenants by the entirety. The Final Decree of divorce that was entered on September 13, 2006, converted the tenancies by the entirety into tenancies in common. Va. Code Ann. § 20-111; see also *Cordova v. Mayer (In re Cordova)*, 73 F.3d 38 (4th Cir. 1996). It is the Debtor's interest in both of the Properties as a tenant in common with Prunty that the Trustee can recover under § 550 and

bring back into the Bankruptcy estate.[8] Prunty has not presented any evidence that would show that she was a transferee[9] who took the Properties from the Trust (1) for value, (2) in good faith, and (3) without knowledge of the avoidability of the transfers such that the Trustee would be prevented from recovering the Properties pursuant to § 550(b) of the Bankruptcy Code. See *King v. United States* (*In re Reasonover*), No. 98-1288, 2001 WL 1168181, at *5 (Bankr. E.D. Va. Apr. 16, 2001) (holding that the transferee has the burden of proof under § 550(b) of the Bankruptcy Code). Accordingly, the Trustee is entitled to summary judgment on Count V of his Complaint, and he may recover the avoided one-half interest in the Properties under § 550(a) of the Bankruptcy Code for the benefit of the bankruptcy estate. Prunty's cross-motion for summary judgment as to Count V will be denied.

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[8] The Trustee's strong arm powers under 11 U.S.C. § 544 trump any interest that Prunty asserts in the Debtor's one-half interest in the Properties that the Trustee has recovered for the estate. *Mayer v. United States* (*In re Reasonover*), 236 B.R. 219, 228 (Bankr. E.D. Va. 1999).

[9] The Court has already found that Prunty is the entity for whose benefit the transfer of the two properties was made. See supra p. 12.

Count VI

The transfer of the Properties having been avoided under Bankruptcy Code § 547 of the Bankruptcy Code, and the Properties having been recovered for the benefit of the bankruptcy estate under Bankruptcy Code § 550, the Trustee and Prunty now hold the Properties as tenants in common. In Count VI of his Complaint, the Trustee seeks authority to sell the Properties under 11 U.S.C. § 3 63(h), which provides:

> Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if-
>
> 1) partition in kind of such property among the estate and such co-owners is impracticable;
>
> 2) sale of the estate's undivided interest in such property would realize significantly less for the estate than sale of such property free of the interests of such co-owners;

3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

11 U.S.C. § 363(h).

The Trustee alleges in Count VI (i) that the price at which each of the Properties could be sold is greater than the aggregate value of all liens on the Properties; (ii) that partition of the Properties among the estate and co-owner Prunty is impracticable; (iii) that sale of the estate's undivided interest in the Properties would realize significantly less for the estate than sale of the Property free of the co-owner's interest; (iv) that the benefit to the estate of a sale of the Properties free of the interest of the co-owner outweighs the detriment, if any, to Prunty; and (v) that the Properties are not used in the production, transmission, or distribution, for sale of electric energy or of natural or synthetic gas for heat, light, or power.

Prunty responded to Count VI in her Answer

by denying that the Trustee has any claim to the Properties under any theory of law whatsoever.[10] She avers that to the extent that paragraphs 50 through 55 of the Trustee's Complaint state any factual allegations or legal conclusions, they are denied.

As the Parties have not stipulated to the facts alleged in Count VI, and as Prunty has denied the Trustee's factual allegations set forth in paragraphs 50 through 55, there remain material facts in dispute as to Count VI that prevent the Court from granting summary judgment to the Trustee on Count VI at this time. Therefore, both Parties' motions for summary judgment as to Count VI will be denied.

Conclusion

Based upon the stipulation of undisputed facts between the Parties, the Trustee has established all of the elements necessary to avoid the transfer of the two Properties from the Debtor and Prunty as

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[10] The Court has dispensed with this defense already, having determined that the Trustee is entitled to summary judgment on Counts I and V of the Complaint, and therefore, that the Trustee owns the Properties with Prunty as tenants in common.

tenants by the entirety to Prunty individually as preferential transfers under §547(b) of the Bankruptcy Code. Execution of the quitclaim deeds constituted transfers of interests of the Debtor in property. For purposes of § 547 of the Bankruptcy Code, the transfers occurred on August 23, 2006 - the date upon which the quitclaim deeds were executed. The transfers of the two Properties was to or for the benefit of Prunty, who was a creditor. The transfers of the Properties were for or on account of an antecedent debt owed by the Debtor before the transfers were made. The Properties were transferred while the Debtor was insolvent. For purposes of § 547 of the Bankruptcy Code, Prunty was an insider of the Debtor. The Properties were transferred during the one-year period preceding the Petition Date. The transfers of the Properties to Prunty enabled her to receive more than she would otherwise be entitled in this Chapter 7 case, and Prunty was the entity for whose benefit the transfers were made. Therefore the Trustee is entitled to summary judgment on the preference count in his Complaint and the transfer of the two Properties will

be avoided.

Avoidance of the transfers reverts title to the Properties to Prunty and the Debtor as tenants by the entirety. The effect of the Final Decree of Divorce was to convert the tenancy by the entirety estate in each of the properties into a tenancy in common. The Trustee is entitled to recover that interest of the Debtor in the two Properties for the benefit of the bankruptcy estate under § 550 of the Bankruptcy Code. The Trustee and Prunty now own the properties as tenants in common.

The Trustee may not sell the estate's interest along with Prunty's interest in the Properties until he has satisfied the requirements of 11 U.S.C. § 363(h). As there remain material facts in dispute as to Count VI, the Trustee is not entitled to summary judgment as to this count at this time. A separate order shall issue.

Entered: Feb 20 2009

Entered on docket: Feb. 20 2009

/s/ Kevin R. Huennekens
UNITED STATES BANKRUPTCY JUDGE

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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

IN RE: RICHARD D. PASCHALL,
Case No. 07-32048

Chapter 7
Debtor.

ROY M. TERRY, JR., Chapter 7 Trustee,

Plaintiff,

v.

Adv. Proc. No. 08-03049

RICHARD D. PASCHALL,
DEBORAH J. PRUNTY (f/k/a Deborah P. Paschall)
and
THE DEBORAH J. PRLTNTY LIVING TRUST,

Defendants.

ORDER

Before the Court are the cross-motions of Roy M. Terry, Jr. (the "Trustee") and Deborah J. Prunty

("Prunty")[1] (together the "Parties") for summary judgment. The question presented by the cross-motions is whether the Trustee can avoid the transfer of two parcels of real property from Richard D. Paschall (the "Debtor") and Prunty as tenants by the entirety to one of the defendants, The Deborah J. Prunty Living Trust dated June 26, 2002 (the "Trust"), under 11 U.S.C. § 547. Hearing was conducted on January 8, 2009 (the "Hearing"), at which counsel for the Trustee and counsel for Prunty and the Trust presented argument on the cross-motions for summary judgment. At the conclusion of the Hearing, the Court announced its decision to grant summary judgment in favor of all three of the Defendants[2] on Counts II, III and IV of the Complaint filed by the Trustee (the "Complaint"). The Court took under advisement the cross-motions

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[1] Prunty was formerly known as Deborah P. Paschall while she was married to Richard D. Paschall, the Debtor.

[2] The Debtor is a co-defendant who appeared and participated at the Hearing pro se. The Court finds that no interest of the Debtor is affected or otherwise involved in connection with the relief afforded herein.

for summary judgment with regard to Counts I (§ 547 Avoidable Preferences), Count V (§ 550 Transferee Liability), and Count VI (§ 363(h) Sale of Co-owned Properties) of the Complaint.

As set forth in the Memorandum Opinion accompanying this Order, the Court found that there were no material facts in dispute as to Count I and Count V, and further that there were material facts in dispute as to Count VI. For the reasons set forth in the Memorandum Opinion, the Court found that the Trustee is entitled to summary judgment on Count I and Count V, and therefore that Prunty's cross-motion for summary judgment on Count I and Count V should be denied. Finally, as there are material facts I in dispute as to Count VI, both the Trustee's and Prunty's motions for summary judgment as to Count VI should be denied.

Accordingly, it is

ORDERED that the Trustee's Motion for Summary Judgment as to Count I is GRANTED; it is further

ORDERED that Prunty's Motion for Summary Judgment as to Count II, Count III and Count IV is GRANTED; it is further

ORDERED that the Trustee's Motion for Summary Judgment as to Count V is GRANTED; it is further

ORDERED that the Trustee's Motion for Summary Judgment as to Count VI is DENIED; and it is further

ORDERED that Prunty's Motion for Summary Judgment as to Count I, Count V, and Count VI is DENIED.

Entered: Feb 20 2009

Entered on docket: Feb. 20 2009
/s/ Kevin R. Huennekens
UNITED STATES BANKRUPTCY JUDGE

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Richard D. Paschall
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IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

IN RE:
RICHARD D. PASCHALL, Chapter 7
Case No. 07-32048

Debtor.

Adv. Proc. No. 08-03049

DEBORAH J. PRUNTY (f/k/a Deborah P. Paschall)
and
THE DEBORAH J. PRUNTY LIVING TRUST,

Appellants.

v. Civil Action
No. 3:09CV220-HEH

ROY M. TERRY, JR., Chapter 7 Trustee,

Appellee.

MEMORANDUM OPINION
(Affirming Order of the Bankruptcy Court and
Remanding for further Proceedings)

THIS MATTER is before the Court on appeal from an Order of the United States Bankruptcy Court for (the Eastern District of Virginia (Bankruptcy Court") issued on February 20, 2009,

awarding the Trustee summary judgment on Counts I and V and denying Appellants' cross motion for summary judgment. The parties have filed extensive memoranda of law in support of their respective positions. The Court will dispense with oral argument because the facts and legal contentions are adequately presented in the materials before the Court, and argument would not aid in the decisional process, Based on an extensive review of the record in this case and for the reasons stated herein, the Court will affirm the Order of the Bankrupty Court.

I. BACKGROUND

A. Procedural and Factual History

Richard D. Paschall ("Debtor") voluntarily filed the current Chapter 7 bankruptcy proceeding on June 3, 2007. The Trustee commenced this adversary proceeding on April 4, 2008, seeking to avoid the transfer of the Debtor's interests in real property to his ex-wife, Deborah J. Prunty ("Prunty"), to recover the property interests or their value for the bankruptcy estate and to sell the real properties at issue under 11 U. SC. § 363(h). The parties stipulated to all the pertinent facts at the

proceeding below, and the Bankruptcy Court adopted the stipulated facts.

The Debtor and Prunty married on June 29, 2002. On July 10, 2003, Prunty sold her separate property, a home located in San Jose, California, for $586,285,73. Two weeks later, Prunty paid a deposit to purchase real property located at 7104 Jocelyn Court in Warrenton, Virginia, (the "Fauquier County Property"), on which the couple intended to build a residence. Prunty paid cash at the closing on the Fauquier County Property, using the proceeds she received from the sale of her California home as well as other separate property investments. Prunty purchased the Fauquier County Property solely from assets that she owned before her marriage to the Debtor. The deed conveying title to Prunty and the Debtor as tenants by the entirety was recorded in Fauquier County on February 2, 2004.

Shortly thereafter, Prunty and the Debtor borrowed $250,000 from Southern Trust Mortgage LLC ("Southern Trust"), which was secured by a deed of trust recorded on February 24. 2004. The loan proceeds were deposited into the couple's joint checking account. The Debtor used a portion of the

loan proceeds to satisfy his premarital and marital unsecured debt. The Debtor then gave Prunty the remaining $136,000 of the loan proceeds.

In the summer of 2004, the Debtor convinced Prunty to purchase real property located at 15018 Rosebay Forest Drive in Midlothian, Virginia, (the "Midlothian Property"), which was owned by the Debtor's mother and stepfather. Prunty paid $42,767.26 from premarital assets at the closing on the Midlothian Property and financed the balance of the purchase with a loan for $183,200 from Southern Trust. The deed conveying title to Prunty and the Debtor as tenants by the entirety was recorded in Chesterfield County on September 8, 2004.

On March 2, 2005, Prunty and the Debtor executed a Marital Agreement, which provided that Prunty would become the exclusive owner of both the Fauquier County Property and the Midlothian Property (collectively, the "Properties") in exchange for cash payments to the Debtor. In turn, the Debtor agreed to convey his interest in the Properties by quitclaim deeds to Prunty in her capacity as trustee

of the Deborah J. Prunty Living Trust (the "Trust").[1] At the time the parties executed the Marital Agreement, the Debtor was not insolvent.

The Debtor became dissatisfied with the terms of the Marital Agreement and insisted on entering into a buyout agreement, which would expedite Prunty's cash payments to the Debtor. The Debtor and Prunty signed the Buyout Agreement on March 31, 2005. At that time, the Debtor was not insolvent.

Prunty paid the Debtor all sums to which he was entitled under the Marital Agreement and the Buyout Agreement, but the Debtor did not sign the quitclaim deeds conveying his interest in the Properties to the Trust. The Debtor did not execute the quitclaim deeds conveying his interest in the Properties until August 23, 2006. The quitclaim deed conveying the Debtor's interest in the Fauquier County Properly was recorded on August 25, 2006. The quitclaim deed conveying the Debtor's interest in the Midlothian Property was recorded on September 5, 2006. At the time the quitclaim deeds

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[1] In two deeds of distribution, recorded on November 5, 2006, and December 5, 2006. respectively, the Trust conveyed its interest in the Properties to Prunty for no consideration.

were recorded, the Debtor was insolvent.

Meanwhile, Prunty had filed for uncontested divorce in Fauquier County on January 30, 2006. The Circuit Court conducted a hearing in the divorce proceeding on July 31, 2006, and entered a Final Decree of Divorce ("Final Decree"), which incorporated by reference the Marital Agreement, on September 13, 2006. The Final Decree was recorded in the law order books and the chancery order books in the records room of the Fauquier County Clerk's Office, but not until June 3, 2007 - the date the Debtor filed his Chapter 7 proceeding. Neither the Final Decree nor the Marital Agreement was ever recorded in the land records of Fatiquier County or Chesterfield County.

On April 4, 2008, the Trustee commenced this adversary proceeding against Prunty and the Trust, seeking to avoid the transfer of the Debtor's interests in the Properties as preferential under 11 U.S.C. 547 (Count I); to avoid the transfers as fraudulent conveyances under II U.S.C. § 548 (Count II); to avoid the transfers as fraudulent conveyances under Virginia law (Count III) to avoid the transfers as voluntary conveyances under Virginia law (Count

IV); to recover the Properties or their value for the bankruptcy estate under 11 U.S.C. § 550 (Count V); and to sell the Properties under 11 U.S.C. § 363(h) (Count VI). The parties filed cross motions for summary judgment on all counts, and the Bankruptcy Court held a hearing on the motions on January 8, 2009. At the hearing, the Bankruptcy Court awarded summary judgment to Prunty and the Trust on Counts II, III, and IV and took the parties' arguments as to Counts I, V, and VI under advisement. In its opinion dated February 20, 2009, the Bankruptcy Court awarded summary judgment to the Trustee on Counts I and V but found that material facts remained in dispute as to Count VI. Accordingly, the Bankruptcy Court denied the parties' motions for summary judgment as to Count VI. Prunty and the Trust filed their Notice of Appeal on March 1, 2009.

B. **Bankruptcy Court Decision**

Based on the stipulated facts, the Bankruptcy Court concluded that the Trustee had established all the elements necessary to avoid the transfers under 11 U.S.C. § 547(5). The Bankruptcy Court ruled that the transfers of the Properties occurred on August

23, 2006 - when the Debtor executed the quitclaim deeds - while the Debtor was insolvent. It also ruled that Prunty qualified as a creditor and an insider of the Debtor and that the transfers were made for Prunty's benefit to account of an antecedent debt owed by the Debtor. Finally, the Bankruptcy Court concluded that the transfers were made during the one-year period preceding the commencement of the Chapter 7 proceeding and that the transfers allowed Prunty to recover more than she would have otherwise been entitled to in the case. Finding that the Trustee had proven all of the requisite elements in II U.S.C. § 547, the Bankruptcy Court awarded summary judgment to the Trustee and avoided the transfers of the Properties to Prunty.

Having avoided the transfers, the Bankruptcy Court stated that title in the Properties reverted to Prunty and the Debtor as tenants by the entirety. Entry of the Final Decree converted the tenancy by the entirety estate in the Properties into a tenancy in common. Therefore, the Bankruptcy Court ruled that the Trustee is entitled to recover the Debtor's interest in the Properties for the benefit of his bankruptcy estate pursuant to 11 U.S.C. 550. As

such, the Bankruptcy Court declared that Prunty and the Trustee now own the Properties as tenants in common. The Bankruptcy Court ruled, however, that the Trustee may not sell the Properties at this time because he has not established that he is entitled to summary judgment on Count VI under 11 U.S.C. § 363(h).

Prunty and the Trust appealed the Bankruptcy Court's decision to avoid the transfer to this Court. Specifically, they challenge 1) the Bankruptcy Court's identification of the transfer date; 2) the Bankruptcy Court's conclusion that the Debtor had an interest in the Properties at the time of the transfer; 3) the Bankruptcy Court's ruling that Prunty qualified as a creditor of the Debtor; 4) the Bankruptcy Court's ruling that Prunty qualified as an insider of the Debtor; 5) the Bankruptcy Court's conclusion that the transfer allowed Prunty to recover more than she would have in a Chapter 7 liquidation; 6) the Bankruptcy Court's failure to give full faith and credit to the Final Decree; and 7) the Bankruptcy Court's rejection of their affirmative defenses of res judicata and collateral estoppel.

II. JURISDICTION

The Court has jurisdiction to hear appeals from "final judgments, orders, and decrees" of the Bankruptcy Court. 28 U.S.C. 158(a). The Court also has discretion to hear appeals from other interlocutory orders and decrees. *Id.* § 158(c). Because it found material facts in dispute as to Count VI, the Bankruptcy Court did not award summary judgment to the Trustee for Count VI. Nor, did the Bankruptcy Court enter final judgment on any of the Trustee's claims pursuant to Rule 54(b) of the Federal Rules of Civil Procedure as applied to bankruptcy cases by Rule 7054 of the Federal Rules of Bankruptcy Procedure. Thus, the Bankruptcy Court's Order is an award of partial summary judgment and is not a final judgment, order, or decree.

Prunty and the Trust, therefore, may appeal the Bankruptcy Court's Order dated February 20, 2009, only with leave of Court. *Id.* While no specific criteria exist to guide the Court's discretion to hear an interlocutory appeal, most district courts faced with the issue follow the standard prescribed in 28 U.S.C. 1292(b), which governs appeals of interlocutory orders from the district courts to the

courts of appeals. Under section 1292(b), the Court 'may consider whether the "order involves a controlling question of law as to which there is substantial ground for difference of opinion and [whether] an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). The Bankruptcy Court's Order involves a controlling question of law - whether the transfers may he avoided under 11 U.S.C. § 547 - the resolution of which will materially advance the litigation. Therefore, the Court will grant Prunty and the Trust leave to appeal and entertain their challenges to the Bankruptcy Court's Order.

III. STANDARD OF REVIEW

On appeal, this Court "may affirm, modify, or reverse a bankruptcy judge's judgment, order, or decree or remand with instructions for further proceedings." Fed. R. Bankr. P. 8013. This Court review[s] the bankruptcy court's legal conclusions de novo and its factual findings for clear error." *In Re: Hartford Sands Inc.*, 372 F.3d 637, 639 (4th Cir. 2004). In cases where the issues present mixed questions of law and fact, the Court will apply the

clearly erroneous standard to the factual portion of the inquiry and de novo review to the legal conclusions derived from those facts. *Gilbane Bldg. Co. v. Fed. Reserve Bank*, 80 F.3d 895, 905 (4th Cir. 1996).

IV. ANALYSIS

A. **The Bankruptcy Court Did not Err in Awarding the Trustee Summary Judgment on Count I.**

In Count I, the Trustee seeks to avoid the transfers of the Properties as preferential pursuant to 11 U.S.C. § 547. The Trustee bears the burden of proving the avoidability of the transfers under section 547(b). Section 547(b) provides that:

The trustee may avoid any transfer of an interest of the debtor in properly—

1) to or for the benefit of a creditor;
2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
3) made while the debtor was insolvent;
4) made-
    A. on or within 90 days before the date of the filing of the petition; or
    B. between ninety days and one year

before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

5) that enables such creditor to receive more than such creditor would receive if

A. the case were a case under chapter 7 of this title;

B. the transfer had not been made; and

C. such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S § 547(b). The Bankruptcy Court held that the Trustee established all of the elements in 547. In reviewing the record, the Court agrees and will affirm the Bankruptcy Courts ruling awarding summary judgment to the Trustee.

1. "Transfer of an interest of the debtor in property"

Prunty contends that the Debtor transferred his interest in the Properties on March 2, 2005, when he signed the Marital Agreement. The Bankruptcy Court rejected Prunty's contention and ruled that the Debtor transferred his interest in the Properties on August 23, 2006 - the date on which he

executed the quitclaim deeds. Prunty challenges this ruling on appeal.

The Bankruptcy Code defines "transfer" as each 'mode, director indirect, absolute or conditional voluntary or involuntary, of disposing of or parting with ... an interest in property." 11 U.S.C. § 101 (54)(D). A "transfer of real property" is deemed "perfected when a bona fide purchaser of such property from the debtor. . . cannot acquire an interest that is superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(A). The phrase 'interest of the debtor in property" is 'not defined by the Bankruptcy Code. Thus, the nature of any interest of the Debtor in the Properties is governed by state law. *Matson v. Grease Monkey Int'l, Inc.*, 237 B.R. 311,314 (Bank. E.D. Va. 1998).

Under the terms of the Marital Agreement, which was not recorded in the land records of either Fauquier County or Chesterfield County, Prunty agreed to make cash payments to Debtor in exchange for the Debtors interest in the Properties. Thus, the Marital Agreement is a contract made for the conveyance or sale of real estate. Va. Code Ann. § 55-96. Under Virginia law, contracts in writing and

deeds are "void to all purchasers for valuable consideration without notice not parties thereto, until and except from the time it is duly admitted to record." Va. Code Ann. § 55-96 (emphasis added). Therefore, the Marital Agreement did not create a "transfer" under § 547 because it was not perfected by recording as required by Virginia law. Instead, the Marital Agreement provided Prunty with nothing more than an inchoate interest in the Debtor's share of the Properties, and the Debtor held his undivided one-half interest in the Properties until the transfer was perfected by recording the signed quitclaim deeds.

Under § 547(e), if a deed conveying an interest in property is recorded within thirty days of execution, the transfer of the property interest is deemed to have occurred on the date of execution. In this case, both quitclaim deeds were recorded within thirty days after the Debtor executed them. Thus, the Debtor transferred his interest in the Properties on August 23, 2006, and the Bankruptcy Court did not err by identifying the date of the transfer as such.

2. The transfer was made "to and/or the benefit of a creditor."

Although the initial transfer was made to the Trust, the Trust promptly transferred the Properties to Prunty for no consideration. Prunty does not challenge the Bankruptcy Court's ruling that the transfer was made to or for the benefit of Prunty.[2] Prunty, however, does challenge the Bankruptcy Court's ruling that she qualified as a creditor of the Debtor under § 547.

The Bankruptcy Code defines 'creditor" as any "entity that has a claim against the debtor that arose at the time on or before the order for relief concerning the debtor. 11 U.S.C. § 101(10)(A). The term "claim" means the

A. right to payment . . or

B. right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured,

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[2] Prunty also does not challenge the Bankruptcy Courts ruling that the transfer was made for or on account of an antecedent debt or that the Debtor was insolvent on August 23, 2006.

disputed, undisputed, secured, or unsecured. Id § 101(5).

The Marital Agreement constituted a binding contract between Prunty and the Debtor. It imposed a legally enforceable obligation on the Debtor to transfer his interest in the Properties to Prunty in exchange for cash payments. Under the Marital Agreement, Prunty had a claim against the Debtor or his interest in the Properties, which arose before the order for bankruptcy relief was entered and for which she could obtain an equitable remedy if he failed to perform his contractual obligation. Therefore, Prunty qualifies as a creditor of the Debtor under § 547.

3. Prunty qualifies as an insider of the Debtor.

Under the Bankruptcy Code, the term "insider" includes relatives of the debtor. *Id.* § 101 (31)(A)(i). A relative is defined as an "individual related by affinity or consanguinity within the third degree as determined by the common law." *Id.* § 101(45).

Because the definition includes individuals

"related by affinity," a current spouse of a debtor qualifies as a relative, but a former spouse is not considered a relative. *Miller v. Schuman*, 81 B.R. 583. 585 (BAP. 9th Cir. 1987). Whether an individual is an insider of the debtor is determined by the relationship between the individual and the debtor at the time of the transfer. 11 U.S.C. § 547(b)(4)(B).

In this case, the hearing on the parties' divorce proceeding was held on July 31, 2006, and the Final Decree was entered on September 13, 2006. In the time between the divorce hearing and the issuance of the Final Decree, the quitclaim deeds conveying the Debtors interest in the Properties were recorded. Under Virginia law, a final judgment takes effect on the date on which the judgment is signed and entered by the Court. Va. Code Ann. § 8.01-2(4); Va. Sup. Ct. R. 1:1 ("The date of entry of any final judgment, order, or decree shall be the date he judgment, order, or decree is signed by the judge."). Thus, Prunty and the Debtor were not legally divorced until September 13, 2006, and Prunty remained the Debtor's spouse at the time of the transfer on August 13, 2006. Therefore, Prunty

qualifies as an insider of the Debtor under § 547.

4. The transfer permitted Prunty to receive more than she would have received in a Chapter 7 proceeding.

To prove that Prunty recovered more than she would have in a Chapter 7 proceeding, the Trustee must establish that Prunty is 1) an unsecured creditor; 2) with a non-priority claim; and 3) that the estate will not distribute a 100% payout to its unsecured creditors. *Matson v. Grease Monkey Int'l, Inc.*, 237 B.R. 311, 315 (Bankr. E.D. Va. 1998). Prunty is an unsecured creditor of the Debtor, and her claim is not given priority status. See 11 U.S.C. § 507. The parties do not dispute that unsecured creditors of the Debtor's estate will receive less than a 100% payout for their claims. Thus, the Trustee satisfied its burden under § 547(b)(5), proving that Prunty received more than she would have in a Chapter 7 proceeding.

B. **Prunty Waived Her Claim to the Full Faith and Credit of the Final Decree because She Failed To Raise the Issue in the Bankruptcy Court.**

Prunty asserts that the Bankruptcy Court erred by not giving full faith and credit to the Final Decree, which incorporated the terms of the Marital Agreement. The Trustee argues that this issue is waived because Prunty is raising it for the first time on appeal. Prunty does not cite any portion of the record in her Reply showing that she raised this issue in the Bankruptcy Court, and the Court's review of the record reveals no reference to this issue by Prunty in the case below. District courts will not review issues raised for the first time on appeal except under exceptional circumstances. *In Re: Endicott*, 57 B.R. 255, 258 (W.D. Va. 1993). Finding no exceptional circumstances in this case, the Court declines to review Prunty's contention that the Bankruptcy Court failed to give full faith and credit to the Final Decree of Divorce.

C. **The Bankruptcy Court Did Not Err by Rejecting Prunty's Reliance on the Doctrines of Res Judicata and Collateral Estoppel.**

Prunty maintains that the Bankruptcy Court

erred by rejecting her reliance on the doctrines of res judicata and collateral estoppel. Prunty asserts that the Trustee's § 547 claim is the same cause of action decided by the Fauquier County Circuit Court in the parties' divorce proceeding. She also contends that the Circuit Court's findings as to the Debtor's interest in the Properties preclude the Trustee from re-litigating the issue in the Bankruptcy Court. The Court disagrees.

"For res judicata to prevent a party from raising a claim, three elements must be present: '(1) a judgment on the merits in a prior suit resolving (2) claims by the same parties or their privies, and (3) a subsequent suit based on the same cause of action." *Ohio Valley Envtl. Coalition v. Aracoma Coal Co.*, 556 F.3d 177, 210 (4th Cir. 2009) (quoting *Aliff v. Joy Mfg. Co.*, 914 F.2d 39,42 (4th Cir. 1990)). As the Trustee correctly points out, the § 547 claim did not exist before the Debtor filed his bankruptcy proceeding on June 3,2007, and could not have been litigated in the parties' divorce proceeding in 2006. Therefore, the doctrine of res judicata is inapplicable to the Trustee's claim.

"For the doctrine of collateral estoppel to apply,

the parties to the two proceedings, or their privies, must be the same; the factual issue sought to be litigated actually must have been litigated in the prior action and must have been essential to the prior judgment; and the prior action must have resulted in a valid, final judgment against the party sought to be precluded in the present action." *TransDulles Ctr. v. Sharma*, 252 Va. 20, 22-23, 472 S.E.2d 274, 275 (Va. 1996). In this case, the Trustee is seeking to avoid preferential transfers of property interests between the Debtor and Prunty. The factual issues related to whether the transfer was indeed preferential were not litigated in the parties divorce proceedings. Therefore, Prunty's defense of collateral estoppel is inappropriate in this case.

V. Conclusion

The Trustee established all of the requisite elements of 547 to enable it to avoid the preferential transfer of the Properties to Prunty. Prunty has not shown that any of the defenses delineated in § 547(c) are applicable to this case. Finding neither legal nor factual error in the Bankruptcy Court's ruling, the Court will affirm the Bankruptcy Court's decision as

to Counts I and V of the Trustee's Complaint, and the Court will remand the ease to the Bankruptcy Court for further proceedings related to Count VI of the Trustee's Complaint.

An appropriate Order will accompany this Memorandum Opinion.

Henry E. Hudson
United States District Judge

ENTERED this 1st day of May, 2009.
Richmond, VA

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

IN RE:
RICHARD D. PASCHALL, Chapter 7
Case No. 07-32048

Debtor.

Adv. Proc. No. 08-03049

DEBORAH J. PRUNTY (f/k/a Deborah P. Paschall)
and
THE DEBORAH J. PRUNTY LIVING TRUST,

Appellants.

v. Civil Action
No. 3:09CV220-HEH

ROY M. TERRY, JR., Chapter 7 Trustee,

Appellee.

ORDER

(Affirming Order of the Bankruptcy Court and
Remanding for further Proceedings)

THIS MATTER is before the Court on appeal from an Order of the United States Bankruptcy Court for the Eastern District of Virginia ("Bankruptcy Court"). For the reasons stated in the accompanying

Memorandum Opinion, the Order of the Bankruptcy Court is AFFIRMED, and the case is REMANDED to the Bankruptcy Court for further proceedings.

The Clerk is directed to send a copy of this Order and the accompanying Memorandum Opinion to all counsel of record.

It is SO ORDERED.

/s/Henry E. Hudson
United States District
Judge

Dated: June 1, 2009
Richmond, VA

FILED: July 14, 2009

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-198
(3:09-cv-00220-HEH)

DEBORAH J. PRUNTY;
THE DEBORAH J. PRUNTY LIVING TRUST,

Petitioners

V.

ROY N. TERRY, JR.,

Respondent

ORDER

Upon consideration of submissions relative to the petition for permission to appeal, the Court grants the petition. This case is transferred to the regular docket and assigned docket number 09-1790. The record shall be retained in the court below unless requested by this Court.

A copy of this order shall be sent to the Clerk of the District Court.

For the Court

/s/ Patricia S. Connor, Clerk

UNPUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1790

DEBORAH J. PRUNTY;
THE DEBORAH J. PRUNTY LIVING TRUST,

Plaintiffs Appellants,

V.

ROY N. TERRY, JR.,

Defendant - Appellee.

Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. Henry B. Hudson, District Judge. (3:09-cv-00220-HEH)

Submitted: June 22, 2010 Decided: July 16, 2010

Before KING, GREGORY, and DUNCAN, Circuit Judges.

Affirmed by unpublished per curiam opinion.

Ann M. Callaway, ANN M. CALLAWAY, P.C., Warrenton, Virginia, for Appellants. John Craig Smith, DURRETTEBRADSHAW, PLC, Richmond, Virginia, for Appellee.

Unpublished opinions are not binding precedent in this circuit.

PER CURIAM:

Deborah J. Prunty and the Deborah J. Prunty Living Trust appeal from the district court's order upholding the bankruptcy court's determination that Prunty received an interest in the debtor's property that was avoidable as a preferential transfer pursuant to 11 U.S.C.A. § 547(b) (West 2004 & Supp. 2010). Our review of the record and the briefs filed by the parties discloses no reversible error. Accordingly, we affirm for the reasons stated by the district court. *Prunty v. Terry*, No. 3:09-cv-00220-HEH (E.D. Va. June 1, 2009). We dispense with oral argument because the facts and legal

contentions are adequately presented in the materials before the court and argument would not aid the decisional process.

AFFIRMED

FILED: July 16, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1790
(3:09-cv-00220-HEH)

DEBORAH J. PRUNTY;
THE DEBORAH J. PRUNTY LIVING TRUST

Plaintiffs - Appellants

v.

ROY M. TERRY, JR.

Defendant – Appellee.

JUDGMENT

In accordance with the decision of this Court, the judgment of the District Court is affirmed.

This judgment shall take effect upon issuance of this Court's mandate in accordance with Fed. R. App. P. 41.

/s/ PATRICIA S. CONNOR, CLERK

Filed: July 26, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09—1790
(3: 09-cv-00220-HEH)

DEBORAH J. PRUNTY;
THE DEBORAH J. PRUNTY LIVING TRUST

Plaintiffs - Appellants

v.

ROY M. TERRY, JR.

Defendant – Appellee.

STAY OF MANDATE UNDER
FED. R. APP. P. 41(d) (1)

This Court's mandate is stayed under Fed. R. App. P. 41(d)(1), which provides that "[t]he timely filing of a petition for panel rehearing, petition for

rehearing en banc, or motion for stay of mandate, stays the mandate until disposition of the petition or motion."

/s/Patricia S. Connor, Clerk

FILED: September 21, 2010

UNTTED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09-1790
(3: 09-cv-00220-HEH)

DEBORAH J. PRUNTY; THE DEBORAH J. PRUNTY LIVING TRUST

Plaintiffs — Appellants

V.

ROY N. TERRY, JR.

Defendant — Appellee

ORDER

The Court denies the petition for rehearing and rehearing en banc. No judge requested a poll

under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge King, Judge Gregory and Judge Duncan.

For the Court

/s/ Patricia S. Connor, Clerk

FILED: September 29, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 09--1790
(3: 09-cv-00220-HEH)

DEBORAH J. PRUNTY;
THE DEBORAH J. PRUNTY LIVING TRUST

Plaintiffs - Appellants

v.

ROY N. TERRY, JR.

Defendant - Appellee

MANDATE

The judgment of this Court, entered 7/16/10, takes effect today.

This constitutes the formal mandate of this Court issued pursuant to Rule 41(a) of the Federal

Rules of Appellate Procedure.

/s/Patricia S. Connor, Clerk

United States Constitution, Article IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

11 U.S.C.A. § 101

§ 101. Definitions

In this title the following definitions shall apply:

(10) The term "creditor" means--

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

(B) entity that has a claim against the estate of a kind specified in section 348(d), 502(f), 502(g), 502(h) or 502(i) of this title; or

(C) entity that has a community claim.

(31) The term "insider" includes--

(A) if the debtor is an individual--

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

(B) if the debtor is a corporation--

(i) director of the debtor;

(ii) officer of the debtor;

(iii) person in control of the debtor;

(iv) partnership in which the debtor is a general partner;

(v) general partner of the debtor; or

(vi) relative of a general partner, director, officer, or person in control of the debtor;

(C) if the debtor is a partnership--

(i) general partner in the debtor;

(ii) relative of a general partner in, general partner of, or person in control of the debtor;

(iii) partnership in which the debtor is a general partner;

(iv) general partner of the debtor; or

(v) person in control of the debtor;

(D) if the debtor is a municipality, elected official of the debtor or relative of an elected official of the debtor;

(E) affiliate, or insider of an affiliate as if such affiliate were the debtor; and

(F) managing agent of the debtor.

(45) The term "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree.

(54) The term "transfer" means--

(A) the creation of a lien;

(B) the retention of title as a security interest;

(C) the foreclosure of a debtor's equity of redemption; or

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with--

(i) property; or

(ii) an interest in property.

11 U.S.C.A. § 544

§ 544. Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by--

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

(b)(1) Except as provided in paragraph (2), the trustee may avoid any transfer of an interest of the debtor in property or any obligation incurred by the debtor that is voidable under applicable law by a creditor holding an unsecured claim that is allowable under section 502 of this title or that is not allowable only under section 502(e) of this title.

(2) Paragraph (1) shall not apply to a transfer of a charitable contribution (as that term is defined in section 548(d)(3)) that is not covered under section 548(a)(1)(B), by reason of section 548(a)(2). Any claim by any person to recover a transferred contribution described in the preceding sentence under Federal or State law in a Federal or State court shall be preempted by the commencement of the case.

11 U.S.C.A. § 547. **Preferences**

(b) Except as provided in subsections (c) and (i) of this section, the trustee may avoid any transfer of an interest of the debtor in property--

1) to or for the benefit of a creditor;
2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
3) made while the debtor was insolvent;
4) made—
    A. on or within 90 days before the date of the filing of the petition; or
    B. between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and
5) that enables such creditor to receive more than such creditor would receive if—
    A. the case were a case under chapter 7 of this title;
    B. the transfer had not been made; and
    C. such creditor received payment of such debt to the extent provided by the provisions of this title.

Va. Code Ann. § 20-107.3

§ 20-107.3. Court may decree as to property of the parties

A. Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce from the bond of matrimony, or upon the filing with the court as provided in subsection J of a certified copy of a final divorce decree obtained without the Commonwealth, the court, upon request of either party, shall determine the legal title as between the parties, and the ownership and value of all property, real or personal, tangible or intangible, of the parties and shall consider which of such property is separate property, which is marital property, and which is part separate and part marital property in accordance with subdivision A 3. The court shall determine the value of any such property as of the date of the evidentiary hearing on the evaluation issue. Upon motion of either party made no less than 21 days before the evidentiary hearing the court may, for good cause shown, in order to attain the ends of justice, order that a different valuation date be used. The court, on the motion of either party, may retain jurisdiction in the final decree of divorce to adjudicate the remedy provided by this section when the court determines that such action is clearly necessary, and all decrees heretofore entered retaining such jurisdiction are validated.

1. Separate property is (i) all property, real and personal, acquired by either party before the marriage; (ii) all property acquired during the marriage by bequest, devise, descent,

survivorship or gift from a source other than the other party; (iii) all property acquired during the marriage in exchange for or from the proceeds of sale of separate property, provided that such property acquired during the marriage is maintained as separate property; and (iv) that part of any property classified as separate pursuant to subdivision A 3. Income received from separate property during the marriage is separate property if not attributable to the personal effort of either party. The increase in value of separate property during the marriage is separate property, unless marital property or the personal efforts of either party have contributed to such increases and then only to the extent of the increases in value attributable to such contributions. The personal efforts of either party must be significant and result in substantial appreciation of the separate property if any increase in value attributable thereto is to be considered marital property.

2. Marital property is (i) all property titled in the names of both parties, whether as joint tenants, tenants by the entirety or otherwise, except as provided by subdivision A 3, (ii) that part of any property classified as marital pursuant to subdivision A 3, or (iii) all other property acquired by each party during the marriage which is not separate property as defined above. All property including that portion of pensions, profit-sharing or deferred compensation or retirement plans of whatever

nature, acquired by either spouse during the marriage, and before the last separation of the parties, if at such time or thereafter at least one of the parties intends that the separation be permanent, is presumed to be marital property in the absence of satisfactory evidence that it is separate property. For purposes of this section marital property is presumed to be jointly owned unless there is a deed, title or other clear indicia that it is not jointly owned.

3. The court shall classify property as part marital property and part separate property as follows:

a. In the case of income received from separate property during the marriage, such income shall be marital property only to the extent it is attributable to the personal efforts of either party. In the case of the increase in value of separate property during the marriage, such increase in value shall be marital property only to the extent that marital property or the personal efforts of either party have contributed to such increases, provided that any such personal efforts must be significant and result in substantial appreciation of the separate property.

For purposes of this subdivision, the nonowning spouse shall bear the burden of proving that (i) contributions

of marital property or personal effort were made and (ii) the separate property increased in value. Once this burden of proof is met, the owning spouse shall bear the burden of proving that the increase in value or some portion thereof was not caused by contributions of marital property or personal effort.

"Personal effort" of a party shall be deemed to be labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial, promotional or marketing activity applied directly to the separate property of either party.

b. In the case of any pension, profit-sharing, or deferred compensation plan or retirement benefit, the marital share as defined in subsection G shall be marital property.

c. In the case of any personal injury or workers' compensation recovery of either party, the marital share as defined in subsection H of this section shall be marital property.

d. When marital property and separate property are commingled by contributing one category of property to another, resulting in the loss of identity of the contributed property, the

classification of the contributed property shall be transmuted to the category of property receiving the contribution. However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, such contributed property shall retain its original classification.

e. When marital property and separate property are commingled into newly acquired property resulting in the loss of identity of the contributing properties, the commingled property shall be deemed transmuted to marital property. However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, the contributed property shall retain its original classification.

f. When separate property is retitled in the joint names of the parties, the retitled property shall be deemed transmuted to marital property. However, to the extent the property is retraceable by a preponderance of the evidence and was not a gift, the retitled property shall retain its original classification.

g. When the separate property of one party is commingled into the separate property of the other party, or the separate property of each party is

commingled into newly acquired property, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, each party shall be reimbursed the value of the contributed property in any award made pursuant to this section.

h. Subdivisions A 3 d, e and f of this section shall apply to jointly owned property. No presumption of gift shall arise under this section where (i) separate property is commingled with jointly owned property; (ii) newly acquired property is conveyed into joint ownership; or (iii) existing property is conveyed or retitled into joint ownership. For purposes of this subdivision A 3, property is jointly owned when it is titled in the name of both parties, whether as joint tenants, tenants by the entireties, or otherwise.

B. For the purposes of this section only, both parties shall be deemed to have rights and interests in the marital property. However, such interests and rights shall not attach to the legal title of such property and are only to be used as a consideration in determining a monetary award, if any, as provided in this section.

C. Except as provided in subsection G, the court shall have no authority to order the division or transfer of separate property or marital property

which is not jointly owned. The court may, based upon the factors listed in subsection E, divide or transfer or order the division or transfer, or both, of jointly owned marital property, or any part thereof. The court shall also have the authority to apportion and order the payment of the debts of the parties, or either of them, that are incurred prior to the dissolution of the marriage, based upon the factors listed in subsection E.

As a means of dividing or transferring the jointly owned marital property, the court may transfer or order the transfer of real or personal property or any interest therein to one of the parties, permit either party to purchase the interest of the other and direct the allocation of the proceeds, provided the party purchasing the interest of the other agrees to assume any indebtedness secured by the property, or order its sale by private sale by the parties, through such agent as the court shall direct, or by public sale as the court shall direct without the necessity for partition. All decrees entered prior to July 1, 1991, which are final and not subject to further proceedings on appeal as of that date, which divide or transfer or order the division or transfer of property directly between the parties are hereby validated and deemed self-executing. All orders or decrees which divide or transfer or order division or transfer of real property between the parties shall be recorded and indexed in the names of the parties in the appropriate grantor and grantee indexes in the land records in the clerk's office of the circuit court of the county or city in which the property is located.

D. In addition, based upon (i) the equities and the rights and interests of each party in the marital property, and (ii) the factors listed in subsection E, the court has the power to grant a monetary award, payable either in a lump sum or over a period of time in fixed amounts, to either party. The party against whom a monetary award is made may satisfy the award, in whole or in part, by conveyance of property, subject to the approval of the court. An award entered pursuant to this subsection shall constitute a judgment within the meaning of § 8.01-426 and shall not be docketed by the clerk unless the decree so directs. An award entered pursuant to this subsection may be enforceable in the same manner as any other money judgment. The provisions of § 8.01-382, relating to interest on judgments, shall apply unless the court orders otherwise.

Any marital property, which has been considered or ordered transferred in granting the monetary award under this section, shall not thereafter be the subject of a suit between the same parties to transfer title or possession of such property.

E. The amount of any division or transfer of jointly owned marital property, and the amount of any monetary award, the apportionment of marital debts, and the method of payment shall be determined by the court after consideration of the following factors:

1. The contributions, monetary and nonmonetary, of each party to the well-being of the family;

2. The contributions, monetary and nonmonetary, of each party in the acquisition and care and maintenance of such marital property of the parties;

3. The duration of the marriage;

4. The ages and physical and mental condition of the parties;

5. The circumstances and factors which contributed to the dissolution of the marriage, specifically including any ground for divorce under the provisions of subdivisions (1), (3) or (6) of § 20-91 or § 20-95;

6. How and when specific items of such marital property were acquired;

7. The debts and liabilities of each spouse, the basis for such debts and liabilities, and the property which may serve as security for such debts and liabilities;

8. The liquid or nonliquid character of all marital property;

9. The tax consequences to each party;

10. The use or expenditure of marital property by either of the parties for a nonmarital separate purpose or the dissipation of such funds, when such was done in anticipation of divorce or separation or after the last separation of the parties; and

11. Such other factors as the court deems necessary or appropriate to consider in order to arrive at a fair and equitable monetary award.

F. The court shall determine the amount of any such monetary award without regard to maintenance and support awarded for either party or support for the minor children of both parties and shall, after or at the time of such determination and upon motion of either party, consider whether an order for support and maintenance of a spouse or children shall be entered or, if previously entered, whether such order shall be modified or vacated.

G. In addition to the monetary award made pursuant to subsection D, and upon consideration of the factors set forth in subsection E:

1. The court may direct payment of a percentage of the marital share of any pension, profit-sharing or deferred compensation plan or retirement benefits, whether vested or nonvested, which constitutes marital property and whether payable in a lump sum or over a period of time. The court may order direct payment of such percentage of the marital share by direct assignment to a party from the employer trustee, plan administrator or other holder of the benefits. However, the court shall only direct that payment be made as such benefits are payable. No such payment shall exceed 50 percent of the marital share of the cash

benefits actually received by the party against whom such award is made. "Marital share" means that portion of the total interest, the right to which was earned during the marriage and before the last separation of the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent.

2. To the extent permitted by federal or other applicable law, the court may order a party to designate a spouse or former spouse as irrevocable beneficiary during the lifetime of the beneficiary of all or a portion of any survivor benefit or annuity plan of whatsoever nature, but not to include a life insurance policy. The court, in its discretion, shall determine as between the parties, who shall bear the costs of maintaining such plan.

H. In addition to the monetary award made pursuant to subsection D, and upon consideration of the factors set forth in subsection E, the court may direct payment of a percentage of the marital share of any personal injury or workers' compensation recovery of either party, whether such recovery is payable in a lump sum or over a period of time. However, the court shall only direct that payment be made as such recovery is payable, whether by settlement, jury award, court award, or otherwise. "Marital share" means that part of the total personal injury or workers' compensation recovery attributable to lost wages or medical expenses to the extent not covered by health insurance accruing during the marriage and before the last separation of

the parties, if at such time or thereafter at least one of the parties intended that the separation be permanent.

I. Nothing in this section shall be construed to prevent the affirmation, ratification and incorporation in a decree of an agreement between the parties pursuant to §§ 20-109 and 20-109.1. Agreements, otherwise valid as contracts, entered into between spouses prior to the marriage shall be recognized and enforceable.

J. A court of proper jurisdiction under § 20-96 may exercise the powers conferred by this section after a court of a foreign jurisdiction has decreed a dissolution of a marriage or a divorce from the bond of matrimony, if (i) one of the parties was domiciled in this Commonwealth when the foreign proceedings were commenced, (ii) the foreign court did not have personal jurisdiction over the party domiciled in the Commonwealth, (iii) the proceeding is initiated within two years of receipt of notice of the foreign decree by the party domiciled in the Commonwealth, and (iv) the court obtains personal jurisdiction over the parties pursuant to subdivision A 9 of § 8.01-328.1, or in any other manner permitted by law.

K. The court shall have the continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order entered pursuant to this section, including the authority to:

1. Order a date certain for transfer or division of any jointly owned property under

subsection C or payment of any monetary award under subsection D;

2. Punish as contempt of court any willful failure of a party to comply with the provisions of any order made by the court under this section;

3. Appoint a special commissioner to transfer any property under subsection C where a party refuses to comply with the order of the court to transfer such property; and

4. Modify any order entered in a case filed on or after July 1, 1982, intended to affect or divide any pension, profit-sharing or deferred compensation plan or retirement benefits pursuant to the United States Internal Revenue Code or other applicable federal laws, only for the purpose of establishing or maintaining the order as a qualified domestic relations order or to revise or conform its terms so as to effectuate the expressed intent of the order.

Va. Code Ann. § 20-109.1

§ 20-109.1. Affirmation, ratification and incorporation by reference in decree of agreement between parties

Any court may affirm, ratify and incorporate by reference in its decree dissolving a marriage or decree of divorce whether from the bond of matrimony or from bed and board, or by a separate decree prior to or subsequent to such decree, or in a decree entered in a suit for annulment or separate maintenance, and in a proceeding arising under subsection A 3 or L of § 16.1-241, any valid agreement between the parties, or provisions thereof, concerning the conditions of the maintenance of the parties, or either of them and the care, custody and maintenance of their minor children, or establishing or imposing any other condition or consideration, monetary or nonmonetary. Provisions in such agreements for the modification of child support shall be valid and enforceable. Unless otherwise provided for in such agreement or decree incorporating such agreement, such future modifications shall not require a subsequent court decree. This section shall be subject to the provisions of § 20-108. Where the court affirms, ratifies and incorporates by reference in its decree such agreement or provision thereof, it shall be deemed for all purposes to be a term of the decree, and enforceable in the same manner as any provision of such decree. The provisions of this section shall apply to any decree hereinbefore or hereinafter entered affirming, ratifying and incorporating an agreement as provided herein. Upon the death or remarriage of the spouse

receiving support, spousal support shall terminate unless otherwise provided by stipulation or contract. In any case where jurisdiction is obtained over a nonresident defendant by order of publication or by acceptance of service pursuant to § 20-99.1:1, any properly acknowledged and otherwise valid agreement entered into between the parties may be affirmed, ratified and incorporated as provided in this section.

Va. Code Ann. § 20-111

§ 20-111. Revocation of death benefits by divorce or annulment.

A. Upon the entry of a decree of annulment or divorce from the bond of matrimony on and after July 1, 1993, any revocable beneficiary designation contained in a then existing written contract owned by one party that provides for the payment of any death benefit to the other party is revoked. A death benefit prevented from passing to a former spouse by this section shall be paid as if the former spouse had predeceased the decedent. The payor of any death benefit shall be discharged from all liability upon payment in accordance with the terms of the contract providing for the death benefit, unless the payor receives written notice of a revocation under this section prior to payment.

B. The term "death benefit" includes any payments under a life insurance contract, annuity, retirement arrangement, compensation agreement or other contract designating a beneficiary of any right, property or money in the form of a death benefit.

C. This section shall not apply (i) to the extent a decree of annulment or divorce from the bond of matrimony, or a written agreement of the parties provides for a contrary result as to specific death benefits, or (ii) to any trust or any death benefit payable to or under any trust.

D. If this section is preempted by federal law with respect to the payment of any death benefit, a former spouse who, not for value, receives the payment of

any death benefit that the former spouse is not entitled to under this section is personally liable for the amount of the payment to the person who would have been entitled to it were this section not preempted.

Va. Code Ann. § 20-155

§ 20-155. Marital agreements

Married persons may enter into agreements with each other for the purpose of settling the rights and obligations of either or both of them, to the same extent, with the same effect, and subject to the same conditions, as provided in §§ 20-147 through 20-154 for agreements between prospective spouses, except that such marital agreements shall become effective immediately upon their execution. If the terms of such agreement are (i) contained in a court order endorsed by counsel or the parties or (ii) recorded and transcribed by a court reporter and affirmed by the parties on the record personally, the agreement is not required to be in writing and is considered to be executed. A reconciliation of the parties after the signing of a separation or property settlement agreement shall abrogate such agreement unless otherwise expressly set forth in the agreement.

Rules of the Supreme Court of Virginia, Rule 1:1

RULE 1:1. FINALITY OF JUDGMENTS, ORDERS AND DECREES

All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order, or decree shall be the date the judgment, order, or decree is signed by the judge.

181 (2)

No. 10-859

In The Supreme Court of the United States

DEBORAH J. PRUNTY, *et al.*,
Petitioners,

v.

ROY M. TERRY, JR.,
CHAPTER 7 TRUSTEE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED BY THE PETITIONERS

Issue # I: If a Virginia state court issues a Final Decree of Divorce that establishes Debtor's rights in all property acquired during his marriage, whether the Bankruptcy Court is required to give full faith and credit to the state court's order on that issue? Is relitigation of an issue decided by the state court barred by collateral estoppel and *res judicata*?

Issue # II: Whether a Chapter 7 Debtor has any interest in real property that was purchased with assets owned by Debtor's ex-wife before their marriage, if, under Virginia law, all property owned by the ex-wife before her marriage is her separate property to which debtor has no claim?

Issue # III: Whether a Chapter 7 Trustee may use 11 U.S.C. [§] 544 to nullify the legal effect of "tenants by the entireties" in a deed held by Debtor and his non-debtor spouse?

Issue # IV: In a case which the Debtor signs a written agreement containing a promise to quitclaim certain real property to an ex-wife pursuant to a Marital Agreement, whether the date of transfer, for the purposes of 11 U.S.C. [§] 547[(b)](4), is the date the agreement was signed or the date the Debtor actually signed the deed?

Issue # V: Whether, under Virginia law, the Debtor's refusal to sign a quitclaim deed pursuant to a Marital Agreement gave his ex-wife a "right to payment," thus turning the ex-wife into a creditor?

Issue # VI: Whether the ex-wife is an insider of the Debtor if the Debtor was convicted of domestic violence (Assault & Battery) against the non-debtor ex-wife, who had to get a protective order before the date of divorce?

Issue # VII: By recovering her property owned before her marriage, whether Debtor's ex-wife received more than she would have in a Chapter 7 liquidation?

TABLE OF CONTENTS

QUESTIONS PRESENTED i

TABLE OF AUTHORITIES iv
- A. Cases iv
- B. U.S. Constitution v
- C. Statutes ..... vi and vii

STATEMENT OF THE CASE 1
- A. Nature of the Case 1
- B. Statement of Facts 1

ARGUMENT 3
- Preface: This entire dispute could have been avoided if Prunty complied with the law 3
- Issue # I 4
- Issue # II 14
- Issue # III 22
- Issue # IV 22
- Issue # V 25
- Issue # VI 27
- Issue # VII 33

CONCLUSION 34

APPENDIX
- A. U.S. Constitution 1
- B. Virginia Statutes 1
- C. Bankruptcy Statutes 10

TABLE OF AUTHORITIES

A. Cases Cited (In alphabetical order) Page

Barnhill v. Vaudreuil (In re Busconi),
177 B.R. 153
(Bankr. D. Mass. 1995).....30 and 31
Belisle v. Plunkett,
877 F.2d 512 (7th Cir. 1989).....21
Coleman v. Cmty. Trust Bank (In re Coleman),
426 F.3d 719 (4th Cir. 2005).....18
Cordova v. Mayer (In re Cordova),
73 F.3d 38 (4th Cir. 1996).....19
D'Agostino v. Genovese (In re Genovese),
No. 95-1984, 1996 U.S. App. LEXIS 24046
(4th Cir. 1996).....6
Dent v. Martin,
86 B.R. 290 (S.D. Fla. 1988).....28
DVI Fin. Serv., Inc. v. DVI Bus. Credit Corp
(In re DVI, Inc.),
306 B.R. 496 (Bankr. Del. 2004).....21
Fairfield v. United States (In re Ballard),
65 F.3d 367 (4th Cir. 1995).....18
Matson v. Grease Monkey Int'l, Inc.
(In re Bev, Inc.), 237 B.R. 311
(Bankr. E.D. Va. 1998).....15 and 33
Mayer v. United States (In re Reasonover),
236 B.R. 219
(Bankr. E.D. Va. 1999).....8, 17 and 18
McWilliams v. Gordon (In re Camp Rockhill, Inc.),
12 B.R. 829 (Bankr. E.D. Pa. 1981).....28
Miller v. Schuman (In re Schuman),
81 B.R. 583 (B.A.P. 9th Cir.Cal. 1987).....30

Muth v. United States,
1 F.3d 246 (4th Cir. 1993) 5
Pereira v. Aetna Cas. & Sur. Co.
(In re Payroll Express Corp.),
921 F. Supp. 1121 (S.D.N.Y. 1996) 9
Peyton v. Robinson (In re Robinson),
346 B.R. 172
(Bankr. E.D. Va. 2006) ..... 8 and 17
Phillips v. Chandler,
215 B.R. 684 (E.D. Va. 1997) ..... 8, 17 and 19
Shawhan v. Shawhan (In re Shawhan),
No. NV-08-1049, 2008 Bankr. LEXIS 4694
(B.A.P. 9th Cir. 2008) 7
Sumski v. Daggett (In re Hoxie),
No. 02-1127, 2003 Bankr. LEXIS 950
(Bankr. D.N.H. 2003) ..... 29 and 32
Sundin v. Klein,
221 Va. 232, 269 S.E.2d 787 (1980) 20
Tribby v. Tribby, 26 Va. Cir. 372,
1992 Va. Cir. LEXIS 132
(1992) ..... 8, 15 and 17
TransDulles Ctr. v. Sharma,
252 Va. 20, 472 S.E.2d 274 (Va. 1996) 13
XL/Datacomp, Inc. v. Wilson
(In re Omegas Group, Inc.),
16 F.3d 1443 (6th Cir. 1994) 21

B. *U.S. Constitution*, Article IV, § 1

C. Statutes Cited

Virginia Statutes
Virginia Code § 8.01-2(4) 29
Virginia Code § 11-1 ..... 16 and 25
Virginia Code § 20-107.3 19
Virginia Code § 20-107.3(A)(3)(h) ..... 20 and 21
Virginia Code § 20-107.3(C) ..... 3, 7, 19 and 20
Virginia Code § 20-111 ..... 19 and 22
Virginia Code § 55-96 ..... 8, 16, 17, 20, 23 and 25

Federal Statutes
11 U.S.C. § 101(5) 26
11 U.S.C. § 101(10)(A) 26
11 U.S.C. § 101(31)(A)(i) 29
11 U.S.C. § 101(45) ..... 29 and 30
11 U.S.C. § 101(54)(D) 15
11 U.S.C. § 102(3) 29
11 U.S.C. § 363(h) 1
11 U.S.C. § 541(a)(3) ..... 1 and 14
11 U.S.C. § 541(d) 18
11 U.S.C. § 544 ..... 10, 12, 13, 19, 21 and 22
11 U.S.C. § 544(a) 19
11 U.S.C. § 544(a)(1) ..... 1, 8, 13 and 17
11 U.S.C. § 544(a)(3) ..... 1, 8, 13 and 17
11 U.S.C. § 547 .. 1, 10, 13, 14, 15, 21, 23, 24 and 25
11 U.S.C. § 547(b) ..... 11, 15 and 33
11 U.S.C. § 547(b)(1) 26
11 U.S.C. § 547(b)(4) 23
11 U.S.C. § 547(b)(4)(B) ..... 28 and 32
11 U.S.C. § 547(e)(2) 24
11 U.S.C. § 547(e)(1)(A) 23
11 U.S.C. § 550 ..... 1 and 13

Other Authorities Cited

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11A MICHIE'S JURISPRUDENCE, Judgment and Decrees § 29 28

STATEMENT OF THE CASE

A. Nature of the Case

This case arises in the context of an interlocutory appeal from a bankruptcy adversary proceeding. The bankruptcy trustee's theory of the case is that the transfers of debtor's interest in real property in Fauquier and Midlothian (the "Properties") from debtor to Prunty during their marriage were preferential transfers (the "Transfers"), which if avoided under 11 U.S.C. § 547, would result in the Properties continuing to be held as tenancy by the entirety until converted to tenants in common upon their pre-petition divorce, so that on June 3, 2007, the date debtor filed a voluntary petition seeking relief under Chapter 7 of the Bankruptcy Code (the "Petition Date"), the bankruptcy trustee's "strong arm" powers as a hypothetical lien creditor under 11 U.S.C. § 544(a)(1) and bona fide purchaser under 11 U.S.C. § 544(a)(3) gave the bankruptcy trustee a one-half interest in the co-owned Properties which he could recover from transferees under 11 U.S.C. § 550, bring into the estate under 11 U.S.C. § 541(a)(3), and sell under 11 U.S.C. § 363(h).

B. Statement of Facts

Respondent objects to the Petitioners characterizing the subject Properties as Prunty's separate property because **the state court never found that the Properties were Prunty's "separate property."** At most, the state court only incorporated into the Final Decree of Divorce whatever property allocation debtor and Prunty

agreed to in the Marital Agreement. In turn, the Marital Agreement expressly states that debtor has an interest in the Properties, which he agreed to convey to Prunty by deed.[1] Pet. App. 12 (Stip. ¶ 41). The reason debtor needed to convey the Properties to Prunty by deed is that they were title at acquisition as tenants by the entirety. Pet. App. 5 (Stip. ¶ 19), 9 (Stip. ¶ 30).

Respondent objects to the Petitioners' misleading assertion that "all of the money used to purchase the Properties came from assets owned by Prunty before the marriage" because the Midlothian Property was acquired in part with debt, *see* Pet. App. at 10 (Stip. ¶ 31), and less than three weeks after purchase of the Fauquier Property a substantial amount of equity was withdraw by Prunty via a bank loan that was to be repaid by debtor and Prunty, *see id.* at 5-6 (Stip. ¶¶ 17-24).

Respondent objects to Petitioners' Fact section because the Petitioners are trying to introduce new allegations of "fact" not found in the record (*compare, e.g.*, Pet. ¶¶ 3, 5, at 4, 5, *with* Pet. App.), and some dates are incorrect (*compare, e.g.*, Pet. at 4 (stating March 31, 2006), *with* Pet. App. at 13-14 (Stip. ¶¶ 44-47, stating March 31, 2005); *compare, e.g.*, Pet. at

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[1] For each Property, the Marital Agreement § 15(a)(2) states: "The parties agree that the Wife shall become the exclusive owner of such property and that the Husband shall relinquish his interest in the marital property to the Wife. Husband agrees to convey to the Wife by Quit Claim Deed all of his right, title and interest in said property to Deborah Paschall Trustee of the Deborah J. Prunty Living Trust dated June 26, 2002".

5 (stating August 13, 2006), *with* Pet. App. at 15 (Stip. ¶¶ 57-58, stating August 23, 2006)).

All necessary facts are in the Stipulation of Facts (Pet. App. at 1 *et seq.*) and will not be repeated here. An excellent narrative of the relevant facts can also be found in the Memorandum Opinions entered by U.S. District Court (Pet. App. at 67-72) and Bankruptcy Court (*Id.* at 30-36).

ARGUMENT

PREFACE: This entire dispute could have been avoided if Prunty complied with the law.

The last sentence of Virginia Code § 20-107.3(C) on domestic relations law states "**All orders or decrees which divide or transfer or order division or transfer of real property between the parties shall be recorded** and indexed in the names of the parties in the appropriate grantor and grantee indexes in the land records in the clerk's office of the circuit court of the county or city in which the property is located." VA. CODE ANN. § 20-107.3(C) (emphasis added). The Petitioners assert that in practice, most divorce lawyers ignore this requirement and just record the deed affecting the transfer. But you ignore the law at your own peril. In most cases that shortcut does not create a problem, but in this case it did.

In this case, Prunty's failure to comply with the law has come back to haunt her. If Prunty had complied with the law by recording the order in land

records, she would have won. She would have given notice to the world, outside the preference look-back period, that debtor did not have an interest in the Properties, which would have prevented the bankruptcy trustee from avoiding the Transfers. Ultimately, Prunty's failure to comply with the law is what allows the bankruptcy trustee to win.

Issue # I: If a Virginia state court issues a Final Decree of Divorce that establishes Debtor's rights in all property acquired during his marriage, whether the Bankruptcy Court is required to give full faith and credit to the state court's order on that issue? Is relitigation of an issue decided by the state court barred by collateral estoppel and *res judicata*?

In the appeal to the Court of Appeals for the Fourth Circuit (hereinafter "4th Circuit"), the Petitioners stated this issue more simply as follows:

> **Whether the Court erred by failing to give full faith and credit to the Final Decree of Divorce, which incorporated the terms of the Marital Agreement by reference, based on the principles of collateral estoppel and *res judicata*?**

A. Full Faith and Credit

1. Prunty has waived her right to argue full faith and credit. The Petitioners are trying to elevate a passing mention of full faith and credit at trial level into the lead argument on appeal to the U.S. Supreme Court. Unfortunately they did not sufficiently bring the full faith and credit argument to the bankruptcy court's attention. On appeal, the U.S. District Court observed that Prunty did not cite any portion of the record showing that she raised this issue in the bankruptcy court, and the district court's review of the record revealed no reference to this argument in bankruptcy court. Pet. App. at 85 (Memo. Op. (E.D. Va.)). The U.S. District Court affirmed the bankruptcy court's ruling. *Id.* The 4th Circuit likewise affirmed for reasons stated by the district court. *Id.* at 94 (Op. (4th Cir.)). The Petitioners now request the U.S. Supreme Court hear the case because their counsel told the bankruptcy court that she "read some of the federal cases on the issue of collateral estoppel and the state – Federal Courts having to recognize full faith and credit . . . . *See* Pet. App. 23-25. Respondent asserts that because the Petitioners did not timely raise this argument in a sufficient manner to focus the bankruptcy court's attention on the issue, they have waived their right to make this argument. *Muth v. United States*, 1 F.3d 246, 250 (4th Cir. 1993).

2. Prunty has grounded her argument in the full faith and credit clause of the U.S. Constitution, which does not apply to this case. At some point, the Petitioners need to be held to what they are actually arguing. The Petitioners assert that "[b]y refusing to be bound by the rulings of state courts on the same issues raised in subsequent bankruptcy cases, the Fourth Circuit is violating the full faith and credit clause of the U.S. Constitution." Pet. at 9; *see also* Pet. App. at 104 (quoting full faith and credit clause in U.S. CONST. art. IV, § 1). However, by its own terms, this constitutional provision applies only to states. Consequently, full faith and credit for judicial proceedings is constitutionally required only where both the first and the second suit are in state court. Because the bankruptcy court is a federal court rather than a state court, the full faith and credit clause in the U.S. Constitution does not apply to this case.

3. There is no split among the Circuits. The Petitioners argue the Petition should be granted because "[t]he Fourth Circuit's dismissal of Prunty's appeal conflicts with a prior ruling in the Fourth Circuit and with [a] ruling in the Ninth Circuit, both of which gave full faith and credit to state court orders in family law cases." Pet. at 6. The first case cited by the Petitioners, *D'Agostino v. Genovese (In re Genovese)*, No. 95-1984, 1996 U.S. App. LEXIS 24046 (4th Cir. 1996) (unpublished), is distinguishable because it dealt with 11 U.S.C. § 523, and unlike our case, it met all the elements for collateral estoppel. The only other case cited by

the Petitioners is *Shawhan v. Shawhan (In re Shawhan)*, No. NV-08-1049-JuKuK, 2008 Bankr. LEXIS 4694 (B.A.P. 9th Cir. 2008), a case which is prefaced by a notice that the disposition is not appropriate for publication and that it has no precedential value under 9th Cir. BAP Rule 8013-1. In *Shawhan*, the court held that the debtor was not allowed to step into the trustee's shoes to use the trustee's avoidance powers because the debtor essentially sought to restore ownership of the marital residence to himself and not for the benefit of his estate or his creditors. *See id.* at *15, *45. Significantly, the court in *Shawhan* did not hold that the trustee could not use his avoidance powers for the benefit of the estate and the creditors.

4. The lower court rulings properly honor both federal and Virginia law. While the Marital Agreement and Final Decree of Divorce may determine the rights in the Properties between Prunty and debtor, under Virginia law it has no effect between Prunty and third parties (or debtor and third parties) until it is recorded in the land records.[2]

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[2] Perhaps this is why the last sentence of Virginia Code § 20-107.3(C) on domestic relations law states "All orders or decrees which divide or transfer or order division or transfer of real property between the parties shall be recorded and indexed in the names of the parties in the appropriate grantor and grantee indexes in the land records in the clerk's office of the circuit court of the county or city in which the property is located." VA. CODE ANN. § 20-107.3(C).

A bankruptcy trustee stands in debtor's shoes in some respects, but a bankruptcy trustee also has rights that the debtor does not have. Most important to this case, these rights include the bankruptcy trustee's rights as a hypothetical lien creditor under Bankruptcy Code § 544(a)(1), and rights as a bona fide purchaser of real estate under Bankruptcy Code § 544(a)(3).

Under Bankruptcy Code § 544(a)(1), Prunty's unrecorded divorce decree is not capable of blocking the Chapter 7 Bankruptcy Trustee's hypothetical lien claim against real property transferred by that divorce decree. *See Phillips v. Chandler*, 215 B.R. 684, 689 (E.D. Va. 1997) (Williams, J.) (*discussing* 11 U.S.C. § 544(a)(1)); *accord Tribby v. Tribby*, 26 Va. Cir. 372, 374, 1992 Va. Cir. LEXIS 132 (1992) (holding an unrecorded property settlement agreement incorporated into a final divorce decree is void against judgment lien creditors).

Under Bankruptcy Code § 544(a)(3), the rights and powers of the Chapter 7 Bankruptcy Trustee as a bona fide purchaser of real estate trumps Prunty's unrecorded domestic relations order. *See Peyton v. Robinson (In re Robinson)*, 346 B.R. 172, 177 (Bankr. E.D. Va. 2006) (*discussing* 11 U.S.C. § 544(a)(3)); *Mayer v. United States (In re Reasonover)*, 236 B.R. 219, 232 (Bankr. E.D. Va. 1999) ("Under Virginia recording statutes, unrecorded conveyances and deeds of trust are 'void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors.' VA. CODE ANN. § 55-96(A)(1). Furthermore, it is well established in

Virginia that a bona fide purchaser takes property free of any latent equity against it.").

B. Res Judicata: claim preclusion and collateral estoppel

The doctrine of *res judicata* encompasses two concepts: claim preclusion and issue preclusion (aka collateral estoppel). The Petitioners have raised them both.

1. Application of *res judicata* in this case violates the Chapter 7 Trustee's due process rights. "As the trustee in bankruptcy is distinct from the pre-petition debtor, the trustee should not be foreclosed from asserting his position." *Pereira v. Aetna Cas. & Sur. Co. (In re Payroll Express Corp.)*, 921 F. Supp. 1121, 1124 (S.D.N.Y. 1996). The preclusive effect of a prior judgment adjudicated in a pre-petition action abrogates a bankruptcy trustee's due process rights. It is unfair to the bankruptcy trustee (and creditors) to have a prior action, in which the trustee had no notice nor any opportunity to join, prejudicially affect the bankruptcy trustee's rights and the rights of the bankruptcy estate. A bankruptcy trustee is the successor to the debtor for many purposes, but he is much more both in the extraordinary rights with which the Bankruptcy Code invests him, and as a general representative of the creditors. Unless he intervenes and takes on the role of an active litigant subjecting himself thereby to the usual incidents of such action, he should not be bound by a judgment

merely because the debtor was a party defendant in the prior litigation.

2. *Res judicata* is inappropriate because the issues did not exist in the prior proceeding and the debtor lacked standing. *Res judicata* precludes relitigation of issues that could have been litigated in a previous action but were not. The trustee's claims under Bankruptcy Code §§ 547 and 544 could not have been pursued by the debtor in the divorce proceeding: Bankruptcy Code § 547 grants the trustee a federal cause of action that does not exist outside of bankruptcy and prior to the bankruptcy petition date, and the debtor does not have the rights of the trustee under Bankruptcy Code § 544 to bring an action as a hypothetical lien creditor and a bona fide purchaser of real estate. The pre-petition divorce proceeding could not be *res judicata* (claim preclusive) with respect to a cause of action that did not even come into existence until the bankruptcy case was filed, nor one in which the debtor did not have standing to pursue.

3. Claim preclusion is inappropriate. In the lower courts, the Petitioners asserted that a litigant who seeks to bar a claim based upon the defense of *res judicata* must have the following four elements: a) identity of the remedy sought; b) identity of the cause of action; c) identity of the parties; and, d) identity of the quality of the persons for or against whom the claim is made. The defendants have the burden of proving by a preponderance of the

evidence that the elements of claim preclusion have been established.

a. The remedy sought by the bankruptcy trustee is not identical to the state remedy. The remedy sought by the bankruptcy trustee in the § 547(b) preference complaint before this Court is that the Transfers to defendants be declared null and void and that the plaintiff be awarded judgments against the defendants. This remedy is not identical to the state remedy because the state remedy sought a determination of rights while the current action seeks a return and turnover of the Properties or monetary judgment.

b. The causes of action are not identical. Here the first cause of action was a state divorce proceeding with property rights determined under Virginia statutes. However, the second cause of action, the bankruptcy preference action, is based upon the federal Bankruptcy Code. The two causes of action are rooted in not only different statutory language, but also different bodies of law.

Nor do the causes of action contain the same factual and legal issues. The first cause of action was a determination of property rights based on a marital agreement, whereas the legal and factual issues in this preferential transfer action gravitate toward the determination of whether the elements of a § 547(b) avoidable preference have been satisfied.

Finally, the evidence supporting both causes of action are not the same. Therefore, the causes of action are not identical.

c. The parties are not identical. A bankruptcy trustee is different than a pre-petition debtor. A bankruptcy trustee acts as a general representative of the creditors, and has special powers. The rights of creditors were not considered in the pre-bankruptcy suit. The bankruptcy trustee's "strong arm" powers under Bankruptcy Code § 544 as a hypothetical lien creditor and bona fide purchaser of real property are very important to this case. These powers of the bankruptcy trustee generally are not available to the debtor; and such powers do not even exist for the bankruptcy trustee until the bankruptcy case is filed. The court should not preclude the bankruptcy trustee from pursing a cause of action that the debtor could not have litigated because the debtor lacked standing.

d. The "qualities of persons" test weighs against *res judicata*. The bankruptcy trustee is separate and distinct from the debtor. Moreover, the bankruptcy trustee acts as a general representative of creditors, whereas debtor/defendant Paschall and defendant Prunty were insiders acting for their own self-interest at the time of the Transfers in question. The Transfers between husband and wife that the bankruptcy trustee seeks to avoid diminished the bankruptcy estate available for debtor's unsecured creditors. Accordingly, the identity of the quality of the persons for or against whom the claim is made weighs against *res judicata*.

4. Issue preclusion (aka collateral estoppel) is inappropriate. In *TransDulles Ctr. v. Sharma*, 252 Va. 20, 472 S.E.2d 274 (Va. 1996), the Virginia Supreme Court identified five elements necessary for collateral estoppel to apply: a) the parties or privies in both the proceedings must be the same; b) the factual issues litigated actually must have been litigated in the prior action; c) the issue litigated must have been essential to the prior judgment; d) the prior action must have resulted in a valid and final judgment against the party sought to be precluded in the present action; and, e) there must be mutuality between the parties. As with claim preclusion, the defendants have the burden of proving by a preponderance of the evidence that the elements of issue preclusion have been established.

a. For reasons previously stated, the parties or privities in both the proceedings are not the same.

b. The factual issues were not actually litigated in the prior action. The bankruptcy trustee is not trying to have the bankruptcy court redetermine ownership rights in the Properties. What the bankruptcy trustee is trying to do is avoid the Transfers (*i.e.*, recordation of the Quitclaim Deeds) as preferential transfers under Bankruptcy Code § 547, assert rights under Bankruptcy Code § 544 as a hypothetical lien creditor (11 U.S.C. § 544(a)(1)) and bona fide purchaser of real property (11 U.S.C. § 544(a)(3)), and recover the Properties under Bankruptcy Code § 550, which brings it into

the bankruptcy estate under Bankruptcy Code § 541(a)(3).

c. The Petitioners have not met her burden of proving the issue was litigated in the prior action.

d. The prior action did not result in a judgment against the bankruptcy trustee.

e. There is no mutuality among the parties.

Issue # II: Whether a Chapter 7 Debtor has any interest in real property that was purchased with assets owned by Debtor's ex-wife before their marriage, if, under Virginia law, all property owned by the ex-wife before her marriage is her separate property to which debtor has no claim?

Respondent objects to the question presented to the extent that it is argumentative, misstates the facts and assumes facts not in the record. *See* objections in Statement of Facts *supra*. In the lower courts, the Petitioners stated this issue more simply as follows:

> **Whether Debtor had any interest in the subject property under Virginia law that he could transfer?**

The introductory language of Bankruptcy Code § 547 requires a "transfer of an interest of the debtor

in property." 11 U.S.C. § 547(b). The term "transfer" found in Bankruptcy Code § 547 is used in the "most comprehensive" sense. It is intended to include every means and manner by which property can pass from ownership and possession of another. Any transaction that reduces or extinguishes valuable legal rights is subject to avoidance. The term encompasses voluntary and involuntary transfers.[3]

An "interest of the debtor in property" is not defined by the Bankruptcy Code. *Matson v. Grease Monkey Int'l, Inc. (In re Bev, Inc.)*, 237 B.R. 311, 314 (Bankr. E.D. Va. 1998). State law determines whether an interest in property exists .... *Id.* (*citing American Bankers Insur. Co. of Florida v. Maness*, 101 F.3d 358, 363 (4th Cir. 1996) (*quoting Butner v. United States*, 440 U.S. 48, 55, 99 S. Ct. 914, 59 L. Ed. 2d 136 (1979))). The question is whether the challenged transfers involved an interest of the debtor in property such that the transfers diminished the funds from which bankruptcy creditors may be paid.

1. Under Virginia law, debtor had "interests" in the Properties which, if not transferred to Prunty, would have been susceptible to claims of debtor's judgment lien creditors. *See Tribby v. Tribby*, 26 Va. Cir. 372, 374, 1992 Va. Cir. LEXIS 132, *4 (1992). As a general rule, a docketed judgment constitutes a

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[3] Bankruptcy Code § 101(54)(D) broadly defines "transfer" as each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing or parting with (i) property; or (ii) an interest in property. 11 U.S.C. § 101(54)(D).

general lien upon all of the debtor's real estate. *Id.* However, the lien attaches only to what the debtor owns – *i.e.*, the actual interest of the judgment debtor in the land. *Id.*

The recording acts cut across these well-recognized principles. *Id.* Virginia Code § 55-96 provides that deeds to real estate and contracts to sell real estate are void as to lien creditors except from the time such instrument is recorded in the county or city where the property lies. *Id.* "**As a result, the interest of a judgment debtor may be determined from the land records and not necessarily from instruments that are unrecorded.**" *Id.* at *5 (emphasis added).

Here, Prunty contends that the doctrine of equitable conversion transformed debtor's interests in the Properties to mere equitable interests on the date the Marital Agreement was made. This contention is correct in some contexts, but it has no effect on debtor's judgment creditors. *Id.* The terms of the Marital Agreement under consideration constitute a contract "made in respect to real estate . . . or made for the conveyance or sale of real estate" under Virginia Code § 11-1; and, as such, were void as against debtor's judgment creditors under Virginia Code § 55-96. *Id.*

The fact that the property settlement agreement was affirmed by the divorce court and incorporated by reference in the Final Decree of Divorce adds nothing to the equation. *Id.* Incorporation does nothing more than allow the court to enforce the contract through its contempt powers pursuant to Virginia Code § 20-

109.1. *Id.* It has no effect on the Marital Agreement's validity vis-a-vis third parties. *Id.*

Therefore, if the debtor had not made the Transfers, on the Petition Date debtor's interests in the Properties would have been susceptible to debtor's judgment lien creditors, including the Chapter 7 Trustee exercising his powers as a hypothetical lien creditor under Bankruptcy Code § 544(a)(1). *See Tribby*, 26 Va. Cir. at 374, 1992 Va. Cir. LEXIS 132, *4; *Phillips v. Chandler*, 215 B.R. 684, 689 (E.D. Va. 1997) (Williams, J.) (holding an unrecorded divorce decree is not capable of blocking a Chapter 7 Bankruptcy Trustee's hypothetical lien claim against real property transferred by that divorce decree).

2. Under Virginia law, debtor had "interests" in the Properties which, if transferred to a bona fide purchaser for value on the Petition Date, would have defeated equitable titles transferred to Prunty. *See Peyton v. Robinson (In re Robinson)*, 346 B.R. 172, 177 (Bankr. E.D. Va. 2006) (*discussing* 11 U.S.C. § 544(a)(3)); *Mayer v. United States (In re Reasonover)*, 236 B.R. 219, 232 (Bankr. E.D. Va. 1999) ("Under Virginia recording statutes, unrecorded conveyances and deeds of trust are 'void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors.' VA. CODE ANN. § 55-96(A)(1). Furthermore, it is well established in Virginia that a bona fide purchaser takes property free of any latent equity against it.").

3. Even if debtor only had legal interests in the Properties, the Chapter 7 Trustee's avoidance powers would trump claims based solely on debtor's lack of equitable title. *See Mayer v. United States (In re Reasonover)*, 236 B.R. 219, 228 (Bankr. E.D. Va. 1999). "Section 541(d) as it now reads does not, expressly or by fair implication, limit or abrogate the trustee's ability to recover property under his avoidance powers simply because the debtor has no equitable interest in that property." *Id.*

4. Debtor had an interest in the Properties. Initially debtor held the Properties with his wife as tenants by the entirety. If nothing else had happened, the debtor's undivided interest in the Properties held as tenants by the entirety as of the Petition Date would have been included in debtor's bankruptcy estate. *See Fairfield v. United States (In re Ballard)*, 65 F.3d 367, 371 (4th Cir. 1995). However, the parties transferred the Properties pre-petition from the tenancy by the entirety to Prunty. **If the Transfers are avoided as preferential transfers, the Transfers and the deed recorded in land records are a nullity and of no effect.** *See Coleman v. Cmty. Trust Bank (In re Coleman)*, 426 F.3d 719, 726 (4th Cir. 2005) ("To 'avoid,' in legal context, means 'to render void.'"). Recorded deeds that are null and void are insufficient to put third parties on notice. The Properties would continue to be held as tenancy by the entirety until the pre-petition divorce, which would have converted debtor's interest in the Properties from tenancy by the entirety to tenants in common. VA. CODE ANN.

§ 20-111; *Cordova v. Mayer (In re Cordova)*, 73 F.3d 38, 39 (4th Cir. 1996). The proper date to determine the trustee's powers under Bankruptcy Code § 544 as a hypothetical lien creditor and bona fide purchaser of real property is the Petition Date. The bankruptcy trustee does not just step into the shoes of the debtor, he also gets whatever interest a hypothetical lien creditor and bona fide purchaser of real property could get in the Properties on the Petition Date. *See* 11 U.S.C. § 544(a).

The Petitioners assert that the Marital Agreement and Virginia Code § 20-107.3 somehow changes this result. The Respondent disagrees as it is contrary to prior rulings that are directly on point: the transfer of real property pursuant to Virginia equitable distribution statutes may determine the rights between married couples, but such decree is not capable of blocking claims of third parties until such decree is recorded. *Phillips v. Chandler*, 215 B.R. 684, 689 (E.D. Va. 1997) (Williams, J.).

In *Phillips* the court held that "**[T]he recording requirements of [Virginia Code] § 20-107.3(C) are absolute determinants of whether a decree has validity**." *Phillips*, 215 B.R. *at* 688. The court noted that the Virginia legislature amended Virginia Code § 20-107.3(C) to require divorce decrees transferring real property be recorded. Read in a light most deferential to Virginia law makers, the recording requirements of Virginia Code § 20-107.3 can only be construed as an embodiment of the legislature's intention to eliminate hidden interests in real property. *Id.* To etch the contours of Virginia Code § 20-107.3(C) completely outside the ambit of

Virginia Code § 55-96(A)(1) is to ignore a legitimate, concerted effort by Virginia law makers to promote public notice of real property transfers and to eliminate hidden interests in real property. *Id.* It is error to not read Virginia Code § 20-107.3(C) into the ambit of Virginia Code § 55-96(A)(1). *Id.* Failure to do so would allow and in fact legalize instances of fraud against innocent and bona fide purchases and/or properly perfected lien creditors. *Id.* Accordingly, the court concluded as a matter of law "that [Virginia Code] § 55-96(A)(1) operates to void the transfer of real property embodied in an unrecorded decree of divorce." *Id.* at 689. The court found "that the debtor had an interest in the former marital residence to which the trustee's hypothetical lien could have attached at the time of the [bankruptcy petition] filing." *Id.* Restated, "under [Virginia Code] §§ 55-96(A) and 20-107.3(C) an unrecorded divorce decree is void *to the extent that it is not capable of blocking* claims against the property *until such time* as the decree is recorded. When the divorce decree is recorded, its legal force in preempting claims is restored." *Id.*

5. Debtor had a one-half interest in the Properties. Even if Prunty paid the full purchase price for the Properties held in entirety estate, it is presumed that she made a gift to her co-tenant of an undivided one-half interest in the Properties. *See Sundin v. Klein*, 221 Va. 232, 234, 269 S.E.2d 787, 792 (1980). Prunty asserts that Virginia Code § 20-107.3(A)(3)(h) overturns the common law presumption that forms the basis for the ruling in

Sundin. It does not. Virginia Code § 20-107.3(A)(3)(h) expressly limits the presumption to contests under that section (*i.e.*, limited to dividing up property between parties of a dissolving marriage). *See* VA. CODE § 20-107.3(A)(3)(h) ("No presumption of gift shall arise **under this section** . . . .") (emphasis added). It changes the presumption between the parties of a dissolving marriage, but it does not change the common law presumption for third-parties until it is put to record.

6. Congress intended this result. The Petitioners conclude that Congress did not intend for a bankruptcy trustee to marshall the assets from third-parties using avoidance powers under § 547 [and § 544], then distribute those assets to debtor's creditors. With all due respect to the Petitioners, the majority rule is that "allowing the estate to 'benefit from property that the debtor did not own' is exactly what the strong-arm powers are about: they give the trustee the status of a bona fide purchaser for value, so that the estate contains interests to which the debtor lacked good title." *See DVI Fin. Serv., Inc. v. DVI Bus. Credit Corp (In re DVI, Inc.)*, 306 B.R. 496, 502 (Bankr. Del. 2004); *accord Belisle v. Plunkett*, 877 F.2d 512, 516 (7th Cir. 1989)); *XL/Datacomp, Inc. v. Wilson (In re Omegas Group, Inc.)*, 16 F.3d 1443, 1452 (6th Cir. 1994).

Issue # III: Whether a Chapter 7 Trustee may use 11 U.S.C. [§] 544 to nullify the legal effect of "tenants by the entireties" in a deed held by Debtor and his non-debtor spouse?

1. The Petitioners have waived this argument because the issue was not raised in the courts below. This is the first time the Petitioners have raised this issue. *See, e.g.*, Pet. App. at 74 (Memo. Op. (E.D. Va.) (issue excluded from court's summary of issues on appeal)).

2. This hypothetical issue is moot because it was not the basis for the lower courts' ruling. The lower courts did not use 11 U.S.C. § 544 to nullify the legal effect of "tenants by the entireties"; rather the lower courts held that the Chapter 7 Trustee was entitled to recover the debtor's interest in the Properties because entry of the Final Decree of Divorce converted the tenancies by the entireties into tenancies in common by operation of state law. Pet. App. at 53 (Memo. Op. (Bankr. E.D. Va.) *citing* VA. CODE ANN. § 20-111); *id.* at 73 (Memo. Op. (E.D. Va.).

Issue # IV: In a case which the Debtor signs a written agreement containing a promise to quitclaim certain real property to an ex-wife pursuant to a Marital Agreement, whether the date of transfer, for the purposes of 11 U.S.C. 547(4) [*sic*], is the date the agreement was

signed or the date the Debtor actually signed the deed?

This issue is more simply stated as follows:

What is the proper date of transfer for the purposes of 11 U.S.C. § 547(b)(4)?

This is a threshold issue and key to this case. For purposes of preferential transfer analysis, the date of transfer is defined by statute. The bankruptcy court and U.S. District Court are correct: for purposes of § 547, the challenged transfers occurred on August 23, 2006 – the date the Quitclaim Deeds were executed. Pet. App. at 48 (Memo. Op. (Bankr. E.D. Va.), 79-80 (Memo. Op. (E.D. Va.)).

The Bankruptcy Code governs the time when a transfer is deemed to occur. Section 547 provides that "[a] transfer of real property . . . is perfected when a bona fide purchaser of such property . . . cannot acquire an interest that is superior to the interest of the transferee." 11 U.S.C. § 547(e)(1)(A). Under this provision, perfection is the key to determining when a § 547 transfer occurred. That determination must be made by reference to state law. Virginia recording statutes provide that contracts in writing and deeds are "void to all purchasers for valuable consideration without notice not parties thereto . . . until and except from the time it is duly admitted to record . . . ." VA. CODE ANN. § 55-96.

When the Bankruptcy Code deems a transfer of real property to have occurred depends on the time elapsed between the transfer and the date such

transfer was perfected. Bankruptcy Code § 547(e)(2) provides:

> For the purposes of this section, . . . a transfer is made –
>
> (A) at the time such transfer takes effect between the transferor and the transferee, if such transfer is perfected at, or within 30 days after, such time, . . . ;
>
> (B) at the time such transfer is perfected, if such transfer is perfected after such 30 days; or
>
> (C) immediately before the date of the filing of the petition, if such transfer is not perfected at the later of –
>
> (i) the commencement of the case; or
>
> (ii) 30 days after such transfer takes effect between the transferor and the transferee.

11 U.S.C. § 547(e)(2). Because the Quitclaim Deeds for the Properties were perfected by recordation within 30 days after such deeds were executed, for purposes of Bankruptcy Code § 547, the transfers of debtor's interests in the Properties were made on August 23, 2006 – the date the Quitclaim Deeds were executed. *See id.*

For purposes of Bankruptcy Code § 547, the U.S. District Court properly concluded that the operative transfer is execution of the Quitclaim Deeds, not the

Marital Agreement. Pet. App. at 79-80 (Memo. Op. (E.D. Va.)). The Marital Agreement is merely a contract for the conveyance or sale of real estate. *Id.* at 43 (Memo. Op. (Bankr. E.D. Va.) *citing* VA. CODE ANN. § 11-1)). Under Virginia law, contracts in writing and deeds are "void to all purchasers for valuable consideration without notice not parties thereto . . . *until and except from the time it is duly admitted to record.*" *Id.* at 80 (Memo. Op. (E.D. Va.) *citing* VA. CODE ANN. § 55-96) (emphasis added by court)). "Therefore, the Marital Agreement did not create a 'transfer' under § 547 because it was not perfected by recording as required by Virginia law." *Id.* "Instead, the Marital Agreement provided Prunty with nothing more than an inchoate interest in the Debtor's share of the Properties, and the Debtor held his undivided one-half interest in the Properties until the transfer was perfected by recording the signed quitclaim deeds." *Id.*

Issue # V: Whether, under Virginia law, the Debtor's refusal to sign a quitclaim deed pursuant to a Marital Agreement gave his ex-wife a "right to payment," thus turning the ex-wife into a creditor?

In the lower courts, the Petitioners stated this issue more simply as follows:

> **Whether the Court erred by ruling that Prunty was a creditor of the Debtor at the time the deeds were signed?**

In order for the bankruptcy trustee to avoid a preferential transfer, the transfer must be to or for the benefit of a creditor. *See* 11 U.S.C. § 547(b)(1). The Bankruptcy Code definition of the term "creditor" includes an "entity that has a claim against the debtor that arose at the time of or **before the order for relief** concerning the debtor." 11 U.S.C. § 101(10)(A) (emphasis added). The Bankruptcy Code further defines "claim" as follows:

> (5) The term "claim" means—
>
> (A) right to payment . . . ; or
>
> (B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

11 U.S.C. § 101(5).

The Petitioners assert Prunty was not a creditor because she did not have a "claim" (*i.e.*, she did not have a right to payment and she did not have a right to an equitable remedy for breach of performance where such breach gave rise to a right to payment). The Respondent disagrees. Before the preferential transfers occurred, Prunty held a contingent claim against the debtor under both the Marital Agreement and the Final Decree of Divorce. The Petitioners' argument ignores that Prunty could enforce her rights under the Marital Agreement using normal contract law, which could have

resulted in a money judgment. The Petitioners' argument also ignores that Prunty could have enforced the Final Decree of Divorce under Virginia Code § 20-107.3(K), which gives the court "continuing authority and jurisdiction to make any additional orders necessary to effectuate and enforce any order . . . ."

Accordingly, before the preferential transfers occurred, Prunty had a claim against the debtor (*i.e.*, debtor was obligated to transfer the Properties to Prunty pursuant to the Marital Agreement and Final Decree of Divorce, Prunty had the right to a money judgment or equitable remedy if debtor did not transfer such Properties), and such claim arose on or before the order for bankruptcy relief was entered. Therefore, Prunty was a "creditor" before the preferential Transfers occurred.

Issue # VI: Whether the ex-wife is an insider of the Debtor if the Debtor was convicted of domestic violence (Assault & Battery) against the non-debtor ex-wife, who had to get a protective order before the date of divorce?

Respondent objects to the question presented to the extent that it is argumentative and contains irrelevant, immaterial or scandalous matter. In the lower courts, the Petitioners stated this issue more simply as follows:

> **Whether the Court erred by ruling that Prunty was an insider of the Debtor at**

the time the Marital Agreements or the deeds were signed?

1. Insider relationship is determined on the exact date of the challenged transfer. "The language of [Bankruptcy Code] section 547(b)(4)(B) clearly states that an insider relationship is to be determined on the *exact date* of the challenged transfer." *Dent v. Martin*, 86 B.R. 290, 292 (S.D. Fla. 1988) (*quoting McWilliams v. Gordon (In re Camp Rockhill, Inc.)*, 12 B.R. 829, 834 (Bankr. E.D. Pa. 1981) (emphasis in original)); 2 COLLIERS ON BANKRUPTCY ¶ 101.31, at 101-143 (Alan N. Resnick & Henry J. Sommer eds., 15th ed. rev. 2008) ("Such creditor must be an insider at the time of the transfer in order for the trustee to avoid the transfer.").

2. At the time of the challenged transfers, Prunty was married to the debtor. In this case, the Quitclaim Deeds were dated August 23, 2006 *see* Pet. App. at 15 (Stip. ¶¶ 57 & 58), which is after the parties divorce trial on July 31, 2006, *see id.* at 15 (Stip. ¶ 56), but before the Final Decree of Divorce was entered on September 13, 2006, *see id.* (Stip. ¶ 60). In the lower courts the Petitioners asserted that for all intents and purposes, debtor and Prunty were divorced when the deeds were executed. *Id.* The Respondent disagrees as it is contrary to Virginia law.

Rendition of a judgment is the pronouncement of the judgment by the court. 11A M.J., Judgment and Decrees § 29. A good deal of controversy and variety of conclusions on the time when a judgment takes effect has been put to rest in Virginia by the

enactment of Virginia Code § 8.01-2(4) which provides that "rendition of a judgment means the time at which the judgment is signed and dated." KENT SINCLAIR & LEIGH MIDDLEDITCH, JR., VIRGINIA CIVIL PROCEDURE, Judgments and Decrees § 14.2[C] (5th ed. 2008) (*quoting* VA. CODE ANN. § 8.01-2(4)); *accord* Virginia Supreme Court Rule 1:1 ("The date of entry of any final judgment order, or decree shall be the date the judgment, order, or decree is signed by the judge."). Because the Final Decree of Divorce was signed by Judge Jeffrey W. Parker on September 13, 2006, the debtor and Prunty were still married at the time the Quitclaim Deeds were recorded on August 23, 2006.

3. At the time of the challenged transfers, Prunty was an "insider" because she was married to the debtor. The Bankruptcy Code defines the term "insider", stating that the term includes "a relative of the debtor". 11 U.S.C. § 101(31)(A)(i). The definition of insider is subject to 11 U.S.C. § 102(3) which states that the term "includes" and "including" are not limiting.

The term "relative" is then defined as an "individual related by affinity or consanguinity within the third degree as determined by common law . . . ." 11 U.S.C. § 101(45). "The word affinity refers to a relationship by marriage, as distinguished from a relationship by blood, or consanguinity." *Sumski v. Daggett (In re Hoxie)*, Adv. No. 02-1127-JMD, 2003 Bankr. LEXIS 950 *7 (Bankr. D.N.H. 2003) (*citing* Garner, A Dictionary of Modern Legal Usage, 2d ed. (1995); BLACK'S LAW DICTIONARY, 7th ed. (1999)).

"A spouse of the debtor is a relative as defined by section [101(45)] because the definition includes individuals 'related by affinity'." *Miller v. Schuman (In re Schuman)*, 81 B.R. 583, 585 (B.A.P. 9th Cir. 1987). A leading bankruptcy treatise agrees:

> The definition of 'relative' does not explicitly state 'and shall include the spouse' as did paragraph (27) of the former Act. The phrase is unnecessary as an 'individual related by affinity' describes an individual related by marriage – thus, the individual's spouse, is, of course, included. However, a former spouse will not be considered a relative, as the definition should be applied as of the time the transaction took place. But if, for example, the transferee of an alleged preferential transfer was still a spouse at the time of the transfer sought to be avoided, then the transferee would be deemed an "insider" and the trustee would have the power to avoid such a transfer.

2 COLLIERS ON BANKRUPTCY ¶ 101.45, at 101-184.

4. The example in the legislative history is exactly on point. In the lower courts, the Petitioners relied on *Barnhill v. Vaudreuil (In re Busconi)*, 177 B.R. 153 (Bankr. D. Mass. 1995), but that case has been strongly criticized even within the 1st Circuit. The problem with *Barnhill* is that it failed to realize that the definition of affinity for estate law purposes was different than the definition for bankruptcy

purposes, and was contrary to the Bankruptcy Code's legislative history which is directly on point:

> In *Barnhill*, the bankruptcy court found that under applicable state law statutes of descent and distribution, spouses were not related by affinity and that Congress had not expressly mentioned spouses in the definition of "relative". [*Barnhill*, 177 B.R. at 157, citing 23 Am. Jur. 2d Descent and Distribution § 52 (1983).] The bankruptcy court held that a non-debtor spouse was not an insider of the debtor spouse for purposes of the Bankruptcy Code. *Barnhill*, 177 B.R. at 161.
>
> The decision in *Barnhill* is based, in part, upon a detailed analysis of a state statute of descent and distribution which was likely drafted with different policy objectives than those used in drafting the Bankruptcy Code. **The meaning Congress ascribed to the term "relative" is reflected in the legislative history of the Bankruptcy Code when discussing the statutory definition of the term:**
>
> > **[a] former spouse is not a relative, but if, for example, for purposes of the preference section, proposed 11 U.S.C.**

> [§] 547(b)(4)(B), **the transferee was a spouse of the debtor at the time of the transfer sought to be avoided, then the transferee would be a relative and subject to insider rules, even if the transferee were no longer married to the debtor at the time of commencement of the case or at the time of the commencement of the preference proceeding.**
>
> H.R. Rep. No. 95-595, at 313 (1977); S. Rep. No. 95-989, at 26 (1978).

Sumski v. Daggett (In re Hoxie), Adv. No. 02-1127-JMD, 2003 Bankr. LEXIS 950 **8-9 (Bankr. D.N.H. 2003). The facts of this case are the same as the example in the legislative history, which stated that a spouse is an insider. *See id.*

5. The rule that a spouse is an insider is based on common sense. A spouse is an insider. It makes no sense to have a rule based on a definition of affinity that results in a spouse's siblings being classified as an insider but the spouse classified as a non-insider.

Moreover, if a spouse was not an insider, it would open the doors to mischief via inter-spousal transfers in the months leading up to bankruptcy. Currently bankruptcy trustees can identify inter-spousal

transfers from the question on the bankruptcy schedules where debtors must disclose all payments made within one year immediately preceding the commencement of the case to or for the benefit of creditors who are insiders. *See* Stmt. of Fin. Affairs Question 3(c). If a spouse is not an insider, it will be even more difficult for bankruptcy trustees to identify inter-spousal transfers deserving close scrutiny.

Issue # VII: By recovering her property owned before her marriage, whether Debtor's ex-wife received more than she would have in a Chapter 7 liquidation?

Respondent objects to the question presented to the extent that it is argumentative, misstates the facts, and is misleading. *See* objections in Statement of Facts *supra*. In the lower courts, the Petitioners stated this issue more simply as follows:

> **Whether the Court erred by ruling that the transfer of the real estate to Prunty permitted Prunty to receive more than she would have in a Chapter 7 liquidation?**

The Chapter 7 Trustee satisfies § 547(b) if the trustee proves that a) the creditor was unsecured; b) the creditor holds a non-priority claim; and c) the estate will not distribute a 100% payout to unsecured creditors. *Matson v. Grease Monkey Int'l, Inc. (In re Bev, Inc.)*, 237 B.R. 311, 315 (Bankr. E.D. Va. 1998).

All three elements are satisfied: a) Prunty is an unsecured creditor holding a contingent claim because she did not record the Marital Agreement or Final Decree of Divorce; b) debts from property settlement agreements are not priority claims; and c) it is undisputed that a 100% distribution to creditors is impossible. *See id.*

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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No. 10-859

In The Supreme Court of the United States

DEBORAH J. PRUNTY, *et al.*,
Petitioners,

v.

ROY M. TERRY, JR.,
CHAPTER 7 TRUSTEE,
Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

APPENDIX

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APPENDIX

U.S. CONSTITUTION, Article IV, § 1

Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof.

VIRGINIA STATUTES

§ 8.01-2. General definitions for this title.
As used in this title, unless the context otherwise requires, the term:

. . .

4. "Rendition of a judgment" means the time at which the judgment is signed and dated;

§ 11-1. Certain contracts void as to creditors and purchasers unless in writing; law governing validity of contracts creating security interests.
Every contract, not in writing, made in respect to real estate or goods and chattels in consideration of marriage, or made for the conveyance or sale of real estate, or a term therein of more than five years, and, except as otherwise provided in § 8.2-402 of the Uniform Commercial Code, every bill of sale or contract for the sale of goods and chattels when the

possession is allowed to remain with the seller, shall be void, both at law and in equity, as to purchasers for value and without notice and creditors; provided, however, that if any such contract or bill of sale as is mentioned in this section creates a security interest as defined in the Uniform Commercial Code, its validity and enforceability shall be governed by the provisions of that Code.

§ 20-107.3(A)-(C). Court may decree as to property of the parties.

A. Upon decreeing the dissolution of a marriage, and also upon decreeing a divorce from the bond of matrimony, or upon the filing with the court as provided in subsection J of a certified copy of a final divorce decree obtained without the Commonwealth, the court, upon request of either party, shall determine the legal title as between the parties, and the ownership and value of all property, real or personal, tangible or intangible, of the parties and shall consider which of such property is separate property, which is marital property, and which is part separate and part marital property in accordance with subdivision A 3. The court shall determine the value of any such property as of the date of the evidentiary hearing on the evaluation issue. Upon motion of either party made no less than 21 days before the evidentiary hearing the court may, for good cause shown, in order to attain the ends of justice, order that a different valuation date be used. The court, on the motion of either party, may retain jurisdiction in the final decree of divorce to adjudicate the remedy provided by this section

when the court determines that such action is clearly necessary, and all decrees heretofore entered retaining such jurisdiction are validated.

1. Separate property is (i) all property, real and personal, acquired by either party before the marriage; (ii) all property acquired during the marriage by bequest, devise, descent, survivorship or gift from a source other than the other party; (iii) all property acquired during the marriage in exchange for or from the proceeds of sale of separate property, provided that such property acquired during the marriage is maintained as separate property; and (iv) that part of any property classified as separate pursuant to subdivision A 3. Income received from separate property during the marriage is separate property if not attributable to the personal effort of either party. The increase in value of separate property during the marriage is separate property, unless marital property or the personal efforts of either party have contributed to such increases and then only to the extent of the increases in value attributable to such contributions. The personal efforts of either party must be significant and result in substantial appreciation of the separate property if any increase in value attributable thereto is to be considered marital property.

2. Marital property is (i) all property titled in the names of both parties, whether as joint tenants, tenants by the entirety or otherwise, except as provided by subdivision A 3, (ii) that part of any property classified as marital pursuant to subdivision A 3, or (iii) all other property acquired by each party during the marriage which is not

separate property as defined above. All property including that portion of pensions, profit-sharing or deferred compensation or retirement plans of whatever nature, acquired by either spouse during the marriage, and before the last separation of the parties, if at such time or thereafter at least one of the parties intends that the separation be permanent, is presumed to be marital property in the absence of satisfactory evidence that it is separate property. For purposes of this section marital property is presumed to be jointly owned unless there is a deed, title or other clear indicia that it is not jointly owned.

3. The court shall classify property as part marital property and part separate property as follows:

a. In the case of income received from separate property during the marriage, such income shall be marital property only to the extent it is attributable to the personal efforts of either party. In the case of the increase in value of separate property during the marriage, such increase in value shall be marital property only to the extent that marital property or the personal efforts of either party have contributed to such increases, provided that any such personal efforts must be significant and result in substantial appreciation of the separate property.

For purposes of this subdivision, the nonowning spouse shall bear the burden of proving that (i) contributions of marital property or personal effort were made and (ii) the separate property increased in value. Once this burden of proof is met, the owning spouse shall bear the burden of proving that

the increase in value or some portion thereof was not caused by contributions of marital property or personal effort.

"Personal effort" of a party shall be deemed to be labor, effort, inventiveness, physical or intellectual skill, creativity, or managerial, promotional or marketing activity applied directly to the separate property of either party.

b. In the case of any pension, profit-sharing, or deferred compensation plan or retirement benefit, the marital share as defined in subsection G shall be marital property.

c. In the case of any personal injury or workers' compensation recovery of either party, the marital share as defined in subsection H of this section shall be marital property.

d. When marital property and separate property are commingled by contributing one category of property to another, resulting in the loss of identity of the contributed property, the classification of the contributed property shall be transmuted to the category of property receiving the contribution. However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, such contributed property shall retain its original classification.

e. When marital property and separate property are commingled into newly acquired property resulting in the loss of identity of the contributing properties, the commingled property shall be deemed transmuted to marital property. However, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, the

contributed property shall retain its original classification.

f. When separate property is retitled in the joint names of the parties, the retitled property shall be deemed transmuted to marital property. However, to the extent the property is retraceable by a preponderance of the evidence and was not a gift, the retitled property shall retain its original classification.

g. When the separate property of one party is commingled into the separate property of the other party, or the separate property of each party is commingled into newly acquired property, to the extent the contributed property is retraceable by a preponderance of the evidence and was not a gift, each party shall be reimbursed the value of the contributed property in any award made pursuant to this section.

h. Subdivisions A 3 d, e and f of this section shall apply to jointly owned property. No presumption of gift shall arise under this section where (i) separate property is commingled with jointly owned property; (ii) newly acquired property is conveyed into joint ownership; or (iii) existing property is conveyed or retitled into joint ownership. For purposes of this subdivision A 3, property is jointly owned when it is titled in the name of both parties, whether as joint tenants, tenants by the entireties, or otherwise.

B. For the purposes of this section only, both parties shall be deemed to have rights and interests in the marital property. However, such interests and rights shall not attach to the legal title of such property and are only to be used as a consideration

in determining a monetary award, if any, as provided in this section.

C. Except as provided in subsection G, the court shall have no authority to order the division or transfer of separate property or marital property which is not jointly owned. The court may, based upon the factors listed in subsection E, divide or transfer or order the division or transfer, or both, of jointly owned marital property, or any part thereof. The court shall also have the authority to apportion and order the payment of the debts of the parties, or either of them, that are incurred prior to the dissolution of the marriage, based upon the factors listed in subsection E.

As a means of dividing or transferring the jointly owned marital property, the court may transfer or order the transfer of real or personal property or any interest therein to one of the parties, permit either party to purchase the interest of the other and direct the allocation of the proceeds, provided the party purchasing the interest of the other agrees to assume any indebtedness secured by the property, or order its sale by private sale by the parties, through such agent as the court shall direct, or by public sale as the court shall direct without the necessity for partition. All decrees entered prior to July 1, 1991, which are final and not subject to further proceedings on appeal as of that date, which divide or transfer or order the division or transfer of property directly between the parties are hereby validated and deemed self-executing. All orders or decrees which divide or transfer or order division or transfer of real property between the parties shall be

recorded and indexed in the names of the parties in the appropriate grantor and grantee indexes in the land records in the clerk's office of the circuit court of the county or city in which the property is located.

§ 20-111. Decree of divorce from bond of matrimony extinguishes contingent property rights. — Upon the entry of a decree of divorce from the bond of matrimony, all contingent rights of either consort in the real and personal property of the other then existing, or thereafter acquired, including the right of survivorship in real or personal property title to which is vested in the parties as joint tenants or as tenants by the entirety, with survivorship as at common law, shall be extinguished, and such estate by the entirety shall thereupon be converted into a tenancy in common.

§ 55-96(A). Contracts, etc., void as to creditors and purchasers until recorded; priority of credit line deed of trust.

A. 1. Every (i) such contract in writing, (ii) deed conveying any such estate or term, (iii) deed of gift, or deed of trust, or mortgage conveying real estate or goods and chattels and (iv) such bill of sale, or contract for the sale of goods and chattels, when the possession is allowed to remain with the grantor, shall be void as to all purchasers for valuable consideration without notice not parties thereto and lien creditors, until and except from the time it is duly admitted to record in the county or city wherein

the property embraced in such contract, deed or bill of sale may be. The fact that any such instrument is in the form of or contains the terms of a quit-claim or release shall not prevent the grantee therein from being a purchaser for valuable consideration without notice, nor be of itself notice to such grantee of any unrecorded conveyance of or encumbrance upon such real estate goods and chattels. The mere possession of real estate shall not, of itself, be notice to purchasers thereof for value of any interest or estate therein of the person in possession. As to goods whose possession is retained by a merchant-seller the provisions of subsection (2) of § 8.2-402 of the Uniform Commercial Code shall be controlling. This section shall not apply to any security interest in goods under the Uniform Commercial Code except as provided in subsection (5) of § 8.9-302. Any bill of sale or contract for the sale of goods or chattels when possession is allowed to remain with the grantor shall be deemed to be duly recorded when it is filed in the same manner as Uniform Commercial Code financing statements are filed under the criteria and in the places established by § 8.9A-501 as if the grantor were a debtor and the grantee a secured party. A recordation under the provisions of this section shall, when any real estate subject to the lien of any such contract has been annexed to or merged with an adjoining city subsequent to such docketing, be deemed to have been recorded in the proper clerk's office of such city.

BANKRUPTCY STATUTES (11 U.S.C. § 101 *et seq.*)

Section 101. Definitions

. . .

(5) "claim" means -

(A) right to payment, whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or

(B) right to an equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured;

. . .

(10) "creditor" means -

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor;

. . .

(31) "insider" includes -

(A) if the debtor is an individual -

(i) relative of the debtor or of a general partner of the debtor;

(ii) partnership in which the debtor is a general partner;

(iii) general partner of the debtor; or

(iv) corporation of which the debtor is a director, officer, or person in control;

. . . .

(45) "relative" means individual related by affinity or consanguinity within the third degree as determined by the common law, or individual in a step or adoptive relationship within such third degree;

. . . .

(54) The term "transfer" means –

. . . .

(D) each mode, direct or indirect, absolute or conditional, voluntary or involuntary, of disposing of or parting with -

(i) property; or

(ii) an interest in property.

Section 102. Rules of construction

In this title -

. . .

(3) "includes" and "including" are not limiting; . . . .

Section 363(h). Use, sale, or lease of property

(h) Notwithstanding subsection (f) of this section, the trustee may sell both the estate's interest, under subsection (b) or (c) of this section, and the interest of any co-owner in property in which the debtor had, at the time of the commencement of the case, an undivided interest as a tenant in common, joint tenant, or tenant by the entirety, only if -

(1) partition in kind of such property among the estate and such co-owners is impracticable;

(2) sale of the estate's undivided interest in such property would realize significantly less for

the estate than sale of such property free of the interests of such co-owners;

(3) the benefit to the estate of a sale of such property free of the interests of co-owners outweighs the detriment, if any, to such co-owners; and

(4) such property is not used in the production, transmission, or distribution, for sale, of electric energy or of natural or synthetic gas for heat, light, or power.

Section 541. Property of the Estate

(a) The commencement of a case under section 301, 302, or 303 of this title creates an estate. Such estate is comprised of all the following property, wherever located and by whomever held:

(1) Except as provided in subsections (b) and (c)(2) of this section, all legal or equitable interests of the debtor in property as of the commencement of the case.

(2) All interests of the debtor and the debtor's spouse in community property as of the commencement of the case that is -

(A) under the sole, equal, or joint management and control of the debtor; or

(B) liable for an allowable claim against the debtor, or for both an allowable claim against the debtor and an allowable claim against the debtor's spouse, to the extent that such interest is so liable.

(3) Any interest in property that the trustee recovers under section 329(b), 363(n), 543, 550, 553, or 723 of this title.

. . .

(d) Property in which the debtor holds, as of the commencement of the case, only legal title and not an equitable interest, such as a mortgage secured by real property, or an interest in such a mortgage, sold by the debtor but as to which the debtor retains legal title to service or supervise the servicing of such mortgage or interest, becomes property of the estate under subsection (a)(1) or (2) of this section only to the extent of the debtor's legal title to such property, but not to the extent of any equitable interest in such property that the debtor does not hold.

Section 544(a). Trustee as lien creditor and as successor to certain creditors and purchasers

(a) The trustee shall have, as of the commencement of the case, and without regard to any knowledge of the trustee or of any creditor, the rights and powers of, or may avoid any transfer of property of the debtor or any obligation incurred by the debtor that is voidable by -

(1) a creditor that extends credit to the debtor at the time of the commencement of the case, and that obtains, at such time and with respect to such credit, a judicial lien on all property on which a creditor on a simple contract could have obtained such a judicial lien, whether or not such a creditor exists;

(2) a creditor that extends credit to the debtor at the time of the commencement of the case, and obtains, at such time and with respect to such credit, an execution against the debtor that is returned unsatisfied at such time, whether or not such a creditor exists; or

(3) a bona fide purchaser of real property, other than fixtures, from the debtor, against whom applicable law permits such transfer to be perfected, that obtains the status of a bona fide purchaser and has perfected such transfer at the time of the commencement of the case, whether or not such a purchaser exists.

Section 547(b). Preferences

(b) Except as provided in subsection (c) of this section, the trustee may avoid any transfer of an interest of the debtor in property -

(1) to or for the benefit of a creditor;

(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;

(3) made while the debtor was insolvent;

(4) made -

(A) on or within 90 days before the date of the filing of the petition; or

(B) between ninety days and one year before the date of the filing of the petition, if such creditor at the time of such transfer was an insider; and

(5) that enables such creditor to receive more than such creditor would receive if -

(A) the case were a case under chapter 7 of this title;

(B) the transfer had not been made; and

(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Section 550(a). Liability of transferee of avoided transfer

(a) Except as otherwise provided in this section, to the extent that a transfer is avoided under section 544, 545, 547, 548, 549, 553(b), or 724(a) of this title, the trustee may recover, for the benefit of the estate, the property transferred, or, if the court so orders, the value of such property, from -

(1) the initial transferee of such transfer or the entity for whose benefit such transfer was made; or

(2) any immediate or mediate transferee of such initial transferee.

No. 10-859

In The Supreme Court of the United States

DEBORAH J. PRUNTY, *et al.*,

Petitioners,

v.

ROY M. TERRY, JR., CHAPTER 7 TRUSTEE,

Respondent.

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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ISSUES RAISED BY RESPONDENT'S BRIEF IN OPPOSITION

I. Whether it was necessary for the Virginia court to have made a specific finding that the subject property was Prunty's "separate property" before the Bankruptcy Court was required to adhere to Virginia law limiting the rights of a debtor to his ex-spouses separate property?

II. Whether that part of § 20-107.3 (C) of the Code of Virginia, which requires a Final Divorce Decree to be recorded and indexed in the land records *if that Decree divides or transfers marital property*, is irrelevant if the parties have previously executed and recorded a deed transferring the property prior to the date the Final Decree is entered?

III. Whether application of *res judicata* in this case violates the Chapter 7 Trustee's due process rights?

IV. Whether the lower courts' rulings properly honor Virginia law?

V. Whether the trustee is relying on circular reasoning to establish the invalidity of the quitclaim deeds signed by debtor?

LIST OF PARTIES TO THE PROCEEDING

Petitioner

Deborah J. Prunty, in her individual capacity and as the Trustee of the Deborah J. Prunty Revocable Trust

Respondent

Roy M. Terry, Chapter 7 Trustee

Debtor

Richard D. Paschall, Debtor

TABLE OF CONTENTS

Issues Raised in Respondent's Brief in Opposition i

Table of Authorities iii

Argument 1

Conclusion 11

TABLE OF AUTHORITIES

State Cases

Papuchis v. Papuchis, 2 Va.App. 130, 132, 341 S.E.2d 829, 831 (1986). 7

Rogers v. Rogers, 512 S.E.2d 821, 257 Va. 323 (Va., 1999) 9

Federal Cases

Schlossberg v. Barney, 380 F.3d 174 (4th Cir., 2004) 3

State Statutes

§ 20-107.3 of the Code of Virginia, 1950, as amended 1, 7

ARGUMENT

I. *There is no requirement that the Virginia court must have previously made a specific finding that the subject property was Prunty's "separate property" in order to trigger the requirement that the Bankruptcy Court abide by Virginia law limiting the rights of a debtor to his ex-spouse's separate property.*

The Bankruptcy Court is required to follow Virginia law to determine debtor's interest in the subject property. This statement of law is undisputed.

The Virginia law that defines debtor's interest in property in this case is the Virginia equitable distribution statute and Virginia real estate law. The former is codified in § 20-107.3 (C) of the Code of Virginia. This statute defines marital property, separate property, and part-marital/part-separate property. It also defines each spouse's interest in each type of property.

Thus, regardless of whether the Virginia divorce court specifically found that the subject property was Prunty's separate property, the Bankruptcy Court was required to apply the Virginia Equitable Distribution Statute to determine debtor's interest in property acquired by Prunty prior to the marriage.

II. *§ 20-107.3 (C) of the Code of Virginia, which requires a Final Divorce Decree to be recorded*

and indexed in the land records if that Decree divides or transfers marital property, is irrelevant to the facts of this case.

The Final Decree of Divorce in this case did not divide or transfer marital property. The title to the subject property had already been transferred by quitclaims deeds executed and recorded approximately a month before the Final Decree of Divorce was signed by the judge.

The purpose of the Virginia statute (requiring recordation of a divorce decree) is to insure that third parties are on notice of changes in ownership of real property after a divorce has taken place. In some cases, parties do not enter into written agreements prior to their divorce trials. In some cases, deeds are not signed and recorded prior to their divorce trials. In those other cases, a judge has to listen to the evidence, apply the Equitable Distribution Statute, and then divide the property. If the judge orders that one spouse must transfer title to real property to the other spouse, and if this language is in the Final Decree, then the Decree must be recorded to put third parties on notice.

However, as any title examiner will tell you, the best and most accepted way of transferring title to real estate, and for putting third parties on notice, is to execute and record a deed. That is the point of the having the collection of land records in every county

courthouse; to put everyone on constructive notice of who owns what.

Thus, even though it might be necessary to record a Final Decree of Divorce in some cases, it was not necessary in this case. It would have been superfluous and pointless because debtor had already signed quitclaims deeds and those deeds had been recorded. There was no better way that debtor and Prunty could have put third parties on notice of the transfer of title to the subject property.

The trustee's attempt to rely on this part of the Equitable Distribution Statute is, at best, due to his unfamiliarity with Virginia divorce and real estate law and procedure; at worst it is a red herring intended to avoid dealing with the reality that valid quitclaim deeds had been recorded and that third parties were on notice of the change in ownership as of the date of recordation and prior to the date of divorce.

III. Application of res judicata in this case does not violate the Chapter 7 Trustee's due process rights.

The trustee has no greater rights in property than does the debtor.[1] This means that the trustee is

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[1] *Schlossberg v. Barney*, 380 F.3d 174 (4th Cir., 2004): "However, bankruptcy recognizes state property rights, and filing bankruptcy cannot give a debtor a greater

bound by prior determination of property rights whether he likes them or not. Trustee has no right to a "do-over" simply because he prefers a different result.

Admittedly, the divorce case involved issues not shared by the bankruptcy case; and vice versa. But, the specific issue of the debtor's rights in the subject property is identical to both. This issue has been resolved by the Virginia court; and the Bankruptcy Court is bound by this aspect of the Virginia divorce decree.

It is no help to the trustee that he was not a party in the divorce case. He stands in debtor's shoes in this case and is the same person for the purpose of analyzing whether collateral estoppels applies.

The best analogy on trustee's claim that being bound by the Final Decree of Divorce denies him his due process right is the "eggshell skull" victim in a negligence case. This common law principle holds that a Defendant must take his victim as Defendant finds him. It is no defense that the victim is more sickly or fragile than other victims.

In our case, the trustee must take the debtor as he finds him. The trustee is bound by debtor's legal

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interest in an asset than that which he owned pre-bankruptcy."

rights to property debtor owns and debtor's lack of legal rights to property that debtor does not own.

Thus, if state law dictates that a debtor has no interest in property because the property was owned by the debtor's spouse prior to their marriage, or because debtor transferred any interest to a spouse in a written agreement, then the trustee has no rights to the same property. The trustee only stands in the shoes of the debtor. If a deed is enforceable against the debtor, it is enforceable against the trustee. If a written agreement is enforceable against the debtor, it is enforceable against the trustee.

If anyone has been denied due process, or will be denied due process if the rulings of the lower courts are upheld, it has been Prunty. As it stands now, she and debtor divided all their property by agreement; she held up her end of the deal by paying debtor what she agreed to pay; debtor (ultimately) held up his end by signing the deeds; the state court incorporated the agreement into the divorce; and their marriage was over. The debtor spent all his money, incurred new debt, and then filed bankruptcy. Now, the trustee wants to sell the property transferred to Prunty in the agreement and keep half the money.

If the terms of a Marital Agreement incorporated into a Final Decree of Divorce can be ignored by a

Bankruptcy Court, then is the Bankruptcy Court going to vacate the Final Decree of Divorce and re-try the divorce case, which will include re-dividing all the marital property that is left? If not, Prunty has been denied her day in court. She would be entitled to prove to the Bankruptcy Court why all the remaining property (not spent on wine, women and song by debtor) is her separate property.

By giving full faith and credit to the Virginia Final Decree of Divorce in the issue of debtor's interest in the real property (collateral estoppels), the Bankruptcy Court is spared the task of re-trying the equitable distribution aspect of a state court divorce case in a post-divorce bankruptcy case where a trustee is trying to undo property division in a divorce. This seems a compelling reason for applying full faith and credit in this context.

IV. The lower courts' rulings do not properly honor state law.

The lower court's rulings completely ignore Virginia law as follows:

They ignore Virginia law defining a debtor's interest in property owned by the parties during a marriage.

They ignore Virginia law defining separate property and limiting the rights of a non-owning spouse to the other spouse's separate property.

They ignore Virginia law defining the legal effect of holding title by tenants by the entireties.

They ignore Virginia law establishing constructive notice to third parties by recording a deed in the land records.

They ignore Virginia law distinguishing between cases where title to property is transferred by a court order from cases where title is transferred by deed.

They consistently cite the trustee's erroneous statement of law that each spouse is "presumed to have a one-half interest in marital property." This is absolutely false, as shown by the wording of the Equitable Distribution statute.[2]

The consistently repeat the trustee's erroneous statement of law that it is presumed that Prunty "made a gift to debtor of a one-half undivided interest in the subject property to debtor." This is flatly contradicted by statute.[3]

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[2] "Under settled principles, Virginia law does not establish a presumption of equal distribution of marital assets." *(Emphasis added.) Papuchis v. Papuchis*, 2 Va.App. 130, 132, 341 S.E.2d 829, 831 (1986) (Emphasis in original).

[3] § 20-107.3 (A)(3)(h). Subdivisions A 3 d, e and f of this section shall apply to jointly owned property. No presumption of gift shall arise under this section where (i) separate property is commingled with jointly owned

The bankruptcy courts are required to use Virginia law to determine debtor's interest in the subject property. If that had been done in this case, the inevitable conclusion is that debtor has no interest in the property and the trustee's Complaint must be dismissed.

V. *The trustee is relying on circular reasoning to establish the invalidity of the quitclaim deeds signed by debtor.*

The timing of the events in this case is critical to reaching a correct conclusion about the legal effect of the quitclaim deeds and final decree of divorce.

Prior to the date the quitclaim deeds were signed, the parties held title as tenants by the entirety. Under Virginia law, as long as title is held as T/E, no creditors of only one spouse can put any lien on the property. [4]

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property; (ii) newly acquired property is conveyed into joint ownership; or (iii) existing property is conveyed or retitled into joint ownership. (Emphasis added.) For purposes of this subdivision A 3, property is jointly owned when it is titled in the name of both parties, whether as joint tenants, tenants by the entireties, or otherwise.

[4] "It is settled that tenancies by the entirety are based upon the same four unities that support joint tenancies, that is, the unities of title, estate, time, and possession. However,

Debtor signed the quitclaim deeds in August, 2006. The deeds were recorded shortly thereafter. The legal effect of recording those deeds was (1) to put the world on constructive notice of the change in ownership of the property; and (2) to transfer fee simple title straight to Prunty. Debtor never got any interest in the property that his creditors could encumber.

Then, the Final Decree if Divorce was signed on September 13, 2006. The legal effect of the Final Decree on the title to the real estate was zero. The Final Decree did not transfer title. The quitclaim deeds had already accomplished the transfer of title about a month before.

In his Response to Prunty's Petition, trustee reasons as follows: *If* the transfers (quitclaim deeds) are avoided, the deeds are of no effect. *If* the deeds are of no effect, then the Final Decree of Divorce

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it is also settled that tenancies by the entirety are supported by a fifth unity which they do not share with any other tenancy: the unity of marriage. That unity embodies the legal fiction that husband and wife are one. And it leads to the result that neither husband nor wife can by his or her sole act defeat the survivorship interest of the other spouse. Neither spouse can by separate act make an absolute disposition of property they hold as tenants by the entirety, nor can a judgment lien creditor of one spouse subject that property to the satisfaction of his lien." *Rogers v. Rogers*, 512 S.E.2d 821, 257 Va. 323 (Va., 1999).

converted the T/E to a tenancy in common, which, in turn, resulted in an interest in the property to which claims of debtor's creditors could attach. *If* the deeds were void and *if* the T/E was converted to a tenancy in common, this would give the trustee the right to avoid the transfers.

In other words, the trustee argues that the deeds are void because they will be void *if* he is successful in his suit to avoid the deeds. And *if* the deeds are void, then, title to the property would be converted to a tenancy in common, which would give the debtor's creditors rights in the property.

The flaw in the trustee's reasoning is that his whole argument hinges on "if" · the premise that the deeds are "avoided." However, the trustee cannot wish away the validity of the deeds. The trustee gives no reason for the invalidity of the deeds other than they are "avoided" because they are void. This is circular reasoning.

If the trustee has any rights in the property, by standing in the debtor's shoes, he must have those rights based on what happened, not by assuming other facts, not by arguing "if."

The quitclaim deeds are not void. They were and are valid transfers of property and their legal effect cannot be wished away by the trustee.

CONCLUSION

For these reasons, Petitioners respectfully request issuance of a writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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